THE INDIAN SUPREME COURT AND POLITICS

Mehr Chand Mahajan Memorial Law Lectures

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FOREWORD

It is a matter of pleasure and privilege for me to write this short foreword to the 1979 series of Mehr Chand Mahajan Memorial Law Lectures delivered by Professor Baxi under the auspices of the Punjab University Department of Laws. Professor Baxi presents a penetrating and brilliant analysis of the judicial pronouncements during and after the recent emergency by correlating dominant socio-political developments to legal developments. In doing so, he projects a descriptive rather than a prescriptive theory of judicial role in the contemporary Indian context. His main thrust since 1967 has been to drive home the fact that the judicial process at the Supreme Court level is a species of political process and constitutional adjudication is essentially a political activity expressed by the court through the medium of legal and jurisprudential language to preserve "the mystery and mystique" of the judicial process and to maintain the illusion that all that the Court does is to interpret the law and the Constitution.

He emphasizes that prior to 1967 the Supreme Court had, in a relatively stable constitutional context, developed attitudes and "reportorie of juristic techniques" to consolidate its role as a centre of political and constitutional power and legitimation. In his scholarly and in-depth analysis of the landmark judicial pronouncements during the Emergency he categorizes, from a juristic standpoint, three distinct phases *viz.* from June to December 1975, from January to June 1976 and from June 1976 to March 20-22, 1977 with a view to grasp the political configuration in which the Supreme Court went about its job. In each of these phases the Court was, Baxi points out, confronted with distinctive problems and had to act in the context of constraints and "growing agenda of apprehensions" posing a "credible threat to its survival as an institution". In the post-emergency phase the pronouncements of the court seek, according to him, a broadly "people oriented" approach, which he terms as populistic approach, seeking, by militant activism, legitimacy from the people.

He articulates the premises (what he terms as 'home truths') for the analysis presented by him. These are that : (*i*) the Supreme Court is a centre of political power because it can influence the agenda of political action and can strike down not only a legislative enactment but also a constitutional amendment, (*ii*) as a centre of political power it is vulnerable because it has no constituency, in the sense politicians have, to support it in times of crisis though it has multiple communication constituencies, (*iii*) it is sensitive to the claims of other major institutions of national government and plays politics

of accommodation to the extent possible by "skilfully managing shifts in the management of distribution of power" and (*iv*) the government as the largest litigant keeps the court busy. At the same time the opposition parties in a largely one-party State consider the Court not only as a Court of last legal recource but quite often as a court of last political recource. The psycho-dynamics of these different pulls and pressures actuates the Court to play politics—politics of power, of accommodation, of survival, of establishment, of aspiration and innovation, of order, of substantive justice, politics for or against the people depending upon the socio-political context and constraints in which it has to operate. When it plays politics and more so politics of opposition in the context of a one-party State, it is inevitably drawn into the vortex of controversy. Professor Baxi urges that it is better for the Court to face controversy rather than irrelevance.

All this is startling enough and gives a jolt to the traditional thinking of lawmen including academic scholars who, by force of training and by dint of inertia, have a bias for the legalist model of judicial role. Scholars of this brand are, more often than not, inconsistent in their approach. Professor Baxi rightly points out that they want the Court to usher social change. Sometimes they become legalist. Sometimes they urge that the Court should do substantive justice even at the cost of legalism. When the Court does so they criticize it for grabbing political power. This sort of muddled thinking is due to various factors including the lack of will and of serious attempt to unambiguously articulate criteria of evaluation and role-expectations which such scholars have about the Court as also due to the fact that behavioural studies about the judges and the Court as an institution have been few and far between.

Professor Baxi's analysis is not tainted with intellectual arrogance. He points out that judging the judges is a very serious matter unless one spells out his own theory, standard and criterion of evaluation. He articulates his premises and hence his analysis is not marked by muddled thinking or ad hocism which is the perennial lacuna in the writings of scholars who, in Baxi's words "pickle" with judicial pronouncements. He rightly points out that cosmopolitan learning and imported technology of role model of judges is of little use unless we evolve our own critique in the light of the social, cutural and political context.

His ideas and approach is contentious and this is, to say the least, a plus point. Professor Baxi cites observations of Hegde and Mukherjea, JJ., in *Kesavananda* in which they deny legitimacy to duly elected majority in the Parliament. He considers this as transcending the bounds of constitutional politics. His observation on this count is open to question since there is empirical truth in what these judges observe and since it is, from the premises articulated by

Professor Baxi, one more implement which can be effectively utilized by the Court to strengthen its position as a centre of political power. It is pertinent, in the context of analysis, to note Justice Bhagwati's observation in the *Dissolution* case that: "Every constitutional question concerns the allocation and exercise of political power and no constitutional question can, therefore, fail to be political. A Constitution is a matter of purest politics".

However one may disagree with Professor Baxi's premises, one cannot afford to ignore his well-reasoned approach and razor-edge analysis. One may however, question his assertion about the amplitude of the 'constituent power' which, according to him, the Court has. Max Radin has rightly observed that we must be humble when we come to define concepts whose meanings are not invariant. Does Prof. Baxi's emphasis that the Supreme Court has constituent power mean that the Court can, while exercising this power, put itself above the Constitution as it did in *Golaknath* by holding that certain constitutional amendments which according to the Court itself were *ultra vires* of the Constitution, were to continue to be valid because the Court said so or to indulge in an archeological exercise for discovering the non-existent fossils of the basic structure in a Constitution so meticulously framed spelling out every detail ? Surely, the framers of the Constitution could not have, by any stretch of imagination, left out such an important aspect to be unearthed by the judiciary. Is it not politics taken to extreme—the Constitution notwithstanding ? Judicial ombudsmania and politics of power must have its limits lest the Court risk credibility and respect which it legitimately commands and should continue to command.

In sum, these three lectures provide rich material. Though unconventional they are refreshing and provide a ferment for thought for all lawmen and impose an obligation on them to respond to his approach by presenting an alternative and convincing descriptive role model for the apex Court spelling out in the process the premises and criteria of evaluation and applying it to a searching analysis of pronouncements of the Court in specific time-cluster and the socio-political context. That will be an immensely fruitful and enlightening exercise

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Chandigarh,
July 7, 1979.

INTRODUCTION

At this juncture of Indian political history, the judiciary and especially the Supreme Court, is increasingly seen as the only surviving assurance of fair play and justice, and even as "the last resort for the oppressed and the bewildered". To suggest at this moment that the Supreme Court is a centre of political power, seeking to discharge its rightful obligations of national governance, and to argue that appellate judicial process at this level is a species of political process and that it *ought* to be so is to provoke contention and controversy. In the present traumatically changeful political context, and the explosive years ahead, elaboration of such heretical ideas is fraught with the danger that it may be used to nourish authoritarian attacks on the structure and function of the Court. Were this to happen, it would make even more onerous the already difficult tasks of the conscientious men adorning the Supreme Court.

And yet what has been said in this book had to be said. It has to be said because it is true. We may, or may not, want a government by judiciary ; but, in certain respects, we have it already. We may, or may not, want justices to have the power to make law and even the Constitution ; but they have it and, what is more, they exercise it readily and regularly. We may, or may not, want them to be seen exercising this power even when they actually exercise it ; but the truth is that the exercise of their power is writ large in the corpus of decisional law. The facts are all against the smug, often unexamined and inherited, assumptions.

If justices have such vast powers, the question is how self-conscious they ought to be in their use. It is my contention that they ought to be fully self-conscious ; that is, they ought to acknowledge full responsibility for political choices they make for the nation, not smother it in the legal and jurisprudential idiom. If in the process the Court loses its legitimacy somewhat, it must bear the loss and search for new bases of legitimation of its power. Such claims have been made before elsewhere in the world, admittedly in relatively stable societies. But so tenacious is the myth on which the power of the judiciary rests that such expose have been, more or less, easily overcome. Why this should happen is itself a problem needing further sociological investigation. But that is not the subject of this exercise.

For the cognoscenti, the main themes of the book may look a bit well worn. Undoubtedly, they have been elaborated in the steadily growing, but still quite unconventional, literature on higher judiciary, particularly in the common law orbit. What is distinctive to the Indian experience, and I hope that this book highlights it adequately, is the fact that the Indian Supreme Court has functioned largely in an inapposite Westminister model of parliamentary democracy. The Court's specific political role lies in its functioning as a parallel legislature and quite often as a parallel constituent body. Through its assumption of constituent power the Court has, time and again, sought to provide a basic framework for political and social development of India. Through its legislative role too it has struggled to provide directions in which the major political institutions of Indian society should move. This is an incredible and inspiring effort having no counterpart either in the "Third World" contexts or, more generally, in the early history of the development of most of the presently overdeveloped nations.

Every author is, understandably, afflicted with an aspiration that what he writes will have an impact. Given the overall intellectual and political ethos of today's India, I will consider my efforts amply rewarded if the salient ideas of this work receive careful consideration, contention and refutation. As a teacher, in any case, that is all I mean by impact. But I must be ready, and I am, treading as I do on treacherous and forbidden territory for denigration and perhaps not-so-benign neglect.

The artist, said Piccaso, "must discover a way to convince the general public the truth of his lies". For much too long the law persons—judges, lawyers and jurists—everywhere in the world have successfully managed to convince the people of the truth of their lies concerning the nature of the judicial process. I consciously join, with this book, the slender minority of people who believe with Thomas Huxley that the "foundation of morality is to have done, once and for all, with lying".

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ACKNOWLEDGMENTS

The invitation by the Department of Laws, University of Punjab, is really responsible for the book in your hands. The incipient idea of dealing with the Court as a political institution, and judicial process as a species of political process, would have lain dormant for many more years had not the University been so generous in extending me the invitation to deliver the second series of these lectures, the first having been delivered by Justice Krishna Iyer on the theme of law and social change.

If the University provided the auspices and the forum, Professor Shiv Dayal provided the necessary tyranny. He insisted on having a complete text of the lectures before scheduling them. He generously used every instrument of communication available to modern civilization to ensure that I performed on the not too readily flexible deadlines. Late night calls, early morning telegrams, and torrent of letters besides recourse to the ancient Indian system of messengers secured for him the total MS.

I also owe a deep debt of gratitude to Professor Shiv Dayal and his colleagues at the University for making my sojourn at Chandigarh a memorable event for me. The three distinguished public men who chaired the lectures, Justice R. P. Khosla, Mr. H. L. Sibal, Sardar Bahadur Narinder Singh, and a receptive audience, from a cross-section of the bar, bench, university and general public made me feel that what I had to say may even interest a larger audience.

Surendra Malik simply hijacked the MS when he saw it during a visit to my home. He would not take "no" for an answer. So when I approached the University with a request to let me publish these lectures, it readily agreed. My sincere gratitude extends to the Vice-Chancellor and Professor Shiv Dayal for this kind gesture and to Surendra Malik for the enthusiasm, despatch and care with which he has personally attended to the publication of the book.

I must also record here my appreciation of the University Grants Commission for having honoured me with National Fellowship in Law which has provided me the necessary relief from the University administration to reflect on some problems of law in contemporary India.

No acknowledgment is complete unless one's appreciation of the library services is fully recorded. I remained fortunate during this period to have the able assistance of Shri Satish Chander, the Law Librarian, and his dedicated colleagues who assisted me, sometimes at irritatingly short notices, with materials, not all of which were easy of access.

After the lectures were delivered, I had the benefit of comments from many people, including some Justices of the Supreme Court and High Courts. To all of them I am grateful. But I would particularly like to mention the patience with which my colleague Lotika Sarkar read through many parts of it at all stages and offered her counsel of prudence and restraint. B. B. Pande, E. Errabi and M. P. Singh offered their evaluations of some aspects of my analysis. I remain grateful to these friends.

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CONTENTS

LECTURE I

THE SUPREME COURT AND POLITICS

LECTURE II

THE TWILIGHT OF LEGITIMACY : THE SUPREME COURT AND THE EMERGENCY

LECTURE III

THE POST-EMERGENCY SUPREME COURT : A POPULISTIC QUEST FOR LEGITIMATION

CONCLUSION

Lecture I

THE SUPREME COURT AND POLITICS

A. CHIEF JUSTICE MAHAJAN AND THE "DARING" OF CONSTITUTIONAL INTERPRETATION

Justice Mehr Chand Mahajan, whose memory this lecture series commemorates, would not have liked at all the themes of these lectures. But I am sure he would have at least liked my stating that he would not have liked the themes. That is because Mehr Chand Mahajan was not just a man with, like most of us, likes and dislikes, but because he liked candour and integrity. He did not hesitate in calling a spade a spade, as any one who reads his essay on "Preserving Unity of India" published on the Independence Day in 1956 would know. Justice Mahajan was a man of strong views; he sought no subterfuges while expressing these. He said whatever he had to say, on Court and in public, clearly and sharply. His opinions (and in a period of about four years he wrote 102 opinions), were lucid and make refreshing reading even today. I have begun to believe that opinions written in the first ten years of the Supreme Court should be compulsory reading for many of our Justices, both on High Courts and Supreme Court for these contain a lot of hints on good judicial diction and craftsmanship. Justice Mahajan's opinions are instructive for the way in which he deals with many complex problems, some of first impression, with effortless ease. Of him, it could be said that he was so clear that even when he was wrong he was clearly wrong. It is better to be clearly wrong than to be deviously right.

Justice Mahajan is also remembered today for his industry. His industry, Setalvad says, was "phenomenal"; and it was combined with "a very quick perception of facts". Brother Justices found it hard to keep pace with him; and the Bar floundered on his impatience. He also valued expedition, to the point of calling counsel to his chambers and urging, some-

times threatening, them to complete arguments. He believed in hard work and attached more importance to practice than precept. While presiding over the Supreme Court Bench in Hyderabad, Justice Mahajan was irked by the leisurely pace of work at Hyderabad High Court. He disposed of 10-12 cases a day and the demonstration was effective. As Chief Justice he performed his duties with gusto. He did not mind visibly nudging his brother Justice who was heard to snore in open Court, as a result of jet lag; and he urged a newly elevated Brother from the South to discontinue wearing *loongi* in Court and start wearing trousers. (Setalvad, 1971: 203-04). Chief Justice Mahajan was not popular with the Bar. The reason was as Justice Mukerjea said in his farewell address:

> Himself a hard working man to a remarkable degree, Justice Mahajan had never any patience with the lazy and pusillanimous in the legal profession and to them his utterances were seldom delectable.

Delectable or not, Justice Mahajan projected, even at the risk of unpopularity, standards of expedition and excellence, which have continuing relevance to the Bench and the Bar of the Supreme Court of the 70s and the 80s. Of course, unintended uncivility was not the only aid to expedition. Chief Justice Mahajan also arranged, for the first time in Court's history, a special bench to sit during a vacation to decide criminal cases quickly. Not many Chief Justices of India after him could claim, that "I have the satisfaction to say that I left no arrears for my successor". Chief Justice Mahajan also found time for law reform. In characteristic unconventionality, he regarded it as a part of his "functions as Chief Justice of India to make certain suggestions about the administration of justice, particularly criminal justice, in the country" and, acting on his self-definition of the role of the Chief Justice, sent a confidential note to Gobind Vallabh Pant, the Home Minister. The Government adopted the suggestions and presented them to the Joint Select Committee (Mahajan, 1963: 213-214). He was keenly interested in the problems of the legal profession and took initiative to create an All-India Bar while in office. In

his farewell speech, he manifested his desire to pursue this cause saying: "Now that I am a free person and I have achieved my freedom from official trappings, I want to assume the role of an agitator" to ensure reforms in the legal profession, judiciary, and law in general (id. p. 216). I believe that in this lecture series his memory would be well served by some review of the intellectual and administrative styles of the fifteen Chief Justices of India from the lamented Justice H. J. Kania to Justice M. H. Beg. Such a review will retrieve for us the self-images of various distinguished men who have adorned the highest judicial positions in the country. What is more, we would learn from the past in our endeavour to redeem the Supreme Court from its current agonies of arrears both by avoiding the mistakes of the past and by adopting the more desirable features of the past practice. I also feel that our understanding of the Court has and will remain incomplete — sometimes woefully — without essays in judicial biography.

I began by saying that Justice Mahajan would have disliked—like most Justices — any talk concerning politics and the Court. But constitutional politics — by which I mean rival assertions for power by Parliament and Court — had already begun in his time. Amendments to the Constitution had begun; and with it responsible and reckless criticism of the Court. *Romesh Thapar* holding was evidently misconstrued by the Patna and Punjab High Courts to mean that incitement to murder or violence was also protected by freedom of speech; before the Supreme Court could clarify the position, as it did, Article 19 was amended. Justice Mahajan did not regard the amendment as "exceptional" as he thought that if a legislature can amend the law if "it found the decision of the highest Court unpalatable" it could also do the same with regard to the Constitution (id. p. 119). But it is obvious that he had reservations about the hurry with which the amendment was brought about, without giving an opportunity to the Court to clarify the law. Similarly, he reacted to the "severe criticism" of the Court during the passage of the Fourth Amendment, in the rather 'mild' fashion:

> Once again there was a good deal of criticism of the Court for *daring to interpret the Constitution as it stood.*

Many of our critics forgot that the function of the Court was to interpret both the Constitution and the statutory law and to declare the latter as unconstitutional if it violated the former. The Court had nothing to do with the wisdom or expediency of any Act (id. at 212, emphasis added).

"Daring to interpret the Constitution as it stood" without reference to the wisdom or expediency of any law requires considerable courage. But the expression is significant: it underlies a conception of the Court's power which seems distinctly apolitical, but on closer analysis is not so. For, the Constitution is ultimately what judges say it is in a dispute before them and the act of invalidating a statute as violative of the Constitution is not just a matter of juristic wisdom, but it is also an act of political will.

Let me say however that Justice Mahajan was as anxious to protect as any judge of the Supreme Court the Court's dignity and status; he was jealous of its role in national affairs. He did not approve of the First and the Fourth Amendments, although he and his colleagues did not withhold the power of amendment of the Constitution, especially fundamental rights, from Parliament. In fact, he described the Ninth Schedule as a "dangerous precedent" but even as early as 1951 he was to remind the nation in words which deserve full quotation that while the Court was mindful of its role, not much was lost:

> Of course, Indian Parliament has not gone — *thanks to the Constitution itself* — to the lengths to which the U. S. Congress had once proceeded when it had taken a case already before the Court away from it (id. 200, emphasis added).

Chief Justice Mahajan when he thanks the *Constitution* in the italicised portion quoted above, is really thanking the *Court*. Little did Chief Justice Mahajan know that in a quarter century this situation was also to come to pass when Parliament would endeavour to strike off a case from the cause list of the Supreme Court by the assertion of the amending constituent power! He would have been gratified that his successors invalidated the amendment in the *Indira Gandhi* case in 1975, in the teeth of a drastic emergency. He might have, like many of us, wished the Court to have done more. And yet his conception of judicial role may have still led him to say, as many Justices of the Court have from time to time said, that it is wrong to impute any political role to the Court. The reason for this is simple: the mystery and miracle of judicial role and power may be threatened with destruction and the Court exposed to new and fierce vulnerabilities entailed in a frank process of political decision-making.

I believe it is time to take stock and to say what judges regard as unsayable: that the Supreme Court is a centre of political power. I believe that the recognition of this fact, howsoever belated, is worthwhile as it would be conducive to the clarification of the political role of the Court. And, such a recognition will impel us to ask more relevant questions as to what kind of political role the Court ought to play in a changing India.

B. CRITICS AND JUDGES: THE NEED TO MOVE FROM CRITICISM TO CRITIQUE

Judges are wonderful targets at all times, for the informed as well as the ignorant, for politicians as well as lawmen. Critics of the Court in India have almost forgotten that judging the judges is a very serious business, more so since judges cannot, while in office, reply and in a status-ridden society like India no one hears them when they answer back from their retirement. Politicians of all shades are quick to denounce judges or judgments when it is expedient for them to so do. Apart from the issues of parliamentary supremacy in the matters of constitutional changes, and the criteria of selection of chief justices, Indian politicians (even of the 'left') have failed altogether to identify what they mean by a good judge and a good decision; they have had no time, even the party theoreticians and ideologues, to articulate any comprehensive political critique of the Court.

Although it is said frequently by Justices of the Supreme Court that the Bar is the best judge of judges, the Bar has kept the criteria of judging the judges as a safely guarded secret within

its guild. The community outside only knows the Bar's capacity of esteem and judgment by symbolic acts of the passing of resolutions, giving or withholding of farewells to retiring judges or attending or boycotting social functions. Again, the Bar has no organized articulation concerning the judicial role, excepting in terms of interactional virtues. Wit and humour, civility, co-operative disposition, dignity and rectitude during oral hearings and comprehensible diction in judgment is all that the Bar seems to expect of a good judge. There is rhetoric concerning independence of the judiciary and the rule of law but this in reality means only protection of civil and political rights which generate litigation and multiply wealth for lawyers as a class. With the notable exception of the Citizens for Democracy (and that, only *after* the emergency) the Bar was not, and has not been, much bothered with the 'treatment' of 'Naxalities' or scheduled castes or bonded labourers or adivasis or prisoners. The list of groups deprived of these rights is a long one. The Bar is only concerned with a small paragraph in a volume of human rights violations in India since Independence—and it is in this context alone that the rhetoric concerning independence of judiciary and rule of law has to be understood.

This leaves us with legal scholars. My tribe too has been trigger-happy. We look at decisions of the Court from time to time and criticize the Court or praise it. We are in no hurry to analyze the Court's normative output. We, quite frankly, have more leisure than justices of the Supreme Court and most of us make use of that leisure in a creative grasp of the realities of judicial process only episodically. More than the politician and the lawyer, the legal scholar's responsibilities are the gravest. It falls to his lot to study the Court as an institution, not just a factory manufacturing legal and constitutional norms. What is worse, it also falls to his lot to develop a *theory* of evaluation of the judicial role. He has to develop a body of standards by which he evaluates the work of judges and courts. This is so difficult and daunting a task that some of us just do not want to do it. But we are adept, if I may use my own fond expression, at "pickling" a judge, adding preservatives, and making a consumer's item of his performance in limited areas.

Some of us hope that out of this "pickling" process, there would emerge a coherent body of standards to evaluate the judicial role-performance. This does not happen. Some of us, in desperation, look overseas and take particular inspiration in great debates on the role of the judges in national affairs in the United States. We mouth then the borrowed wisdom—we emulate Felix Frankfurter's 'judicial restraint', or Hugo Black's 'activism', or Cardozo's deathless generalities on judicial process or the controversy of 'neutral principles' initiated by Weschler, Rostow (1962: 24-44), Bickel (1962: 49-65), Miller and Howel (1961). Or, we turn to role-models in the Commonwealth: be it the legalism of Sir Owen Dixon or activism of Lord Denning or heroism of Lord Atkin or eclectism of Judge Bora Laskin. Some of us keep hoping that a universal theory of appellate judicial process could emerge which we can, without much effort, apply in India. And so we turn to the great works of Karl Lewyellen (1961) or Julius Stone (1964, 1966).

The trouble is that cosmopolitan learning can at best provide orientations for critiques of courts and judges. It cannot help us either to precisely identify our own problems or answers to them. Indian justices are not simply Frankfurters, Holmses, Blacks, Cardozos, Warrens, Dennings or Atkinses. Justices of the Indian Supreme Court flourish in wholly different cultural, political and social milieux; even if their *concerns* are broadly liberal, their problems are distinctively Indian. The same is true of Indian legal scholars. Judges are often heard to say: where is an Indian Pound or Indian Stone or Indian Hart or even an Indian Bickel?

Implicit in this kind of demand, is a model of excellence not wholly apposite to levels of juristic maturity of India, whether at the level of legislation, legal profession, judiciary or academe. What we need is to turn *inwards*, to discover our own patterns of juristic development, to identify the social configurations in which the law-jobs get done differentially from period to period. This cannot be done by imported technology of precedents or role-models of judges, profession and law scholarship.

It isin this endeavour that Indian legal scholars have a role

to play. I deliberately avoid using the term 'jurist' because that term has been debased in India; just every person—whether a lawyer, judge, text-book writer, even a politician who is a law degree holder and even a functionary of a court is called a jurist in India. The term has become wholly meaningless, as has its Indian version 'the legal luminary'. Law scholars have to begin to look at the Court as a whole in its various periods and to correlate the dominant socio-political developments to legal developments. And they have to ferret out the patterns of craftsmanship and creativity of each justice of the Supreme Court, and for the whole court in specific time-clusters. In the process, they have to learn to develop articulation of specific standards of evaluation of judicial work, with an eye to its impact, over periods of time. When that happens, cosmopolitan learning on judicial process would become more relevant and useful. It could never be as useful as a starting point.

Scholars, like Justices of the Supreme Court, are also human beings and liable to err. But both scholars and justices often think that they are endowed with superior wisdom; and this common error, this illusion of infallibility, costs the nation in the long run enlightened jurisprudence. The harsh fact is that all of us have limited wisdom, but unlimited egos. Humility is the first virtue for the scholar when he approaches the judicial work. As a veteran student of the judicial process has reminded us in his life work:

> We should still be aware . . . that courts do not (nor can we always expect them to) "conduct their discourses at the highest levels of analysis and reasoning of which man is capable. They often miss this goal for reasons having more to do with capacity than desire". And, by the same token, if we are tempted to stop appellate judges in their tracks, and tell them what they should be doing or avoiding, *we should ourselves stop short of assuming that at the turning points of judgment we have answers where they have but prejudices or confusions* (Stone, 1966: 672, emphasis added).

We have to add, in the Indian context, status-ridden as it is, that the same dictate of humility should guide the judges as *they* approach scholarly work.

The experience of 1975-77 emergency has shown us how fallible we all are. And yet, in the aftermath of the emergency, the lawmen—lawyer, judge and scholar—behave with a moral absolutism which would warm the cockles of the heart of any dictator. Those of us in judiciary and universities who remained silent in the years 1975-77 find it suddenly necessary to condemn *others* as responsible for the emergency and its excesses. Suddenly, in 1977 and 1978 very strong denunciations of the Supreme Court decision in the *habeas corpus* case have begun to appear in law journals and law books. The Court stands condemned for a single fateful decision. Many who were vocal in condemnation of *Kesavananda* in their scholarly essays and treatises have suddenly (with the one *notable* exception of Dr. S. P. Sathe), without explicitly acknowledging the basic changes in their worldview, become votaries of basic structure and have begun to criticize the decision to convene a Full Court to review *Kesavananda* during the emergency. Many scholars who wanted the Court to be overtly activist, and iusnaturalist, during the emergency have begun complaining that there is just too much activism in the post-emergency court! Not just the Union Law Minister, but many scholars are asking: what was the basis or power of the Court in *Hoskot* to lay down detailed prescriptions on legal aid? Many critics of *Shiv Kant* are, interestingly, also critics of reading of "due process" in Article 21 in *Maneka Gandhi*. It is unnecessary to multiply examples. But it is clear that the Court gets it *both* ways. It is condemned if it stays put, as during the emergency; it is condemned if it marches ahead, in breathless splendour, as the post-emergency Court is doing. Critics of the Court want the Court to strike a 'balance'. It is such a nice thing to strike a balance; if only you can strike a 'right' balance. If Nero was a tyrant when he fiddled while Rome burnt, he too was striking some sort of 'balance'. There is no point in scholarly counsel that the Court strike a balance; it means very little as a counsel of prudential action.

What is necessary, in my view, is that both the critics of the

Court and the Court accept certain hometruths, which history has established, for the summit judiciary in India. Let me elaborate on this theme.

C. THE COURT AS A CENTRE OF POWER AND ITS VULNERABILITY

The first hometruth is that the Indian Supreme Court is a centre of *political* power, even though a vulnerable one. It is a centre of political power simply because it can influence the *agenda of political action,* control over which is what power politics is in reality all about. The Indian Court has not merely the power to read down statutes or to hold executive action illegal and void but also to strike down laws. What is more, it has also the power to review and invalidate constitutional amendments. It has thus constituent power — a theme I have been elaborating on since 1967, though no one takes it seriously as it disturbs the smug ideologies or fantasies we still have about judicial power.

The second hometruth is that as a centre of power, the Court remains vulnerable. The Court has no constituency in the sense that politicians have. The advantage in having constituencies is that they support you when you need support — the constituencies may exact a price for support which you can then pass on to people at large through your decisions. The disadvantage in having constituencies is that from time to time you have to account for your actions. Political accountability does not mean at all that you perform as you promise but only that, for a variety of reasons, you cannot altogether take your constituencies for granted. But even a minimal form of accountability is a great help if you want to stay in power; it acts, in a representative democracy, as source of legitimacy.

The Indian Supreme Court too has constituencies but they are of a different type. I have maintained that the Court has multiple communication-constituencies in the sense that it tries to reach out to different groups through its decisions and to generate consensus and acceptance of its authority (Baxi, 1978). But the groups that the Court can reach out to are determined by the exigencies of disputes brought before it and the degree of

self-awareness and its ability to articulate and communicate its decisions to such groups. The process of reaching out involves the sophisticated medium of legal language and the conservative agency of the legal profession as carriers of communication. And the effectiveness of the impact of its decision depends ultimately on the executive will, since, as is well known, it cannot execute its own decisions (illustrated by the time it has taken recently to secure compliance with release of undertrials).

The result is that when the Court is in crisis, there is no assurance that any definite group of people will rally round it. Even the legal profession tends to get divided on major crisis facing the Court. And in any case, it is always easy for the politician and the critic to momentarily rob the Court of its legitimacy by the flat assertion that the Court wields power without accountability. In all democratic societies this objection to judicial review is commonly urged from time to time when Courts begin to do substantive justice, as distinct from justice under the law. It is easy to analyze the decisions of courts and to ask: will the Supreme Court judges also fight elections? (Tripathi: 1975: 36). The message in such questions is simple: "You judges are not 'accountable' for the exercise of your power; you must, therefore, either disown your power and be merely glorified legal technocrats, or you must use it on rare occasions. It is just too bad if your power gets atrophied in the process."

Yet in the real world of politics, politicians are accountable only in the minimal sense indicated a little earlier, and perhaps accountable in the sense that they are vulnerable to pressures in legislatures and the media and those arising from civil disobedience. Such pressures generally mean that they cannot always do what they want to or get away *always* with doing just what they please. But if this is all there is to accountability, the Supreme Court too is accountable to litigants, the bar, the legislature, the executive, and to legal scholars, all of whom exert pressure from time to time upon the Court.

The major difference happens to be simply that in order to meet the objections, such as they are on the grounds of account-

ability, the Justices of the Indian Supreme Court have perforce to exercise their power in, what to a layman, would appear to be quite *devious* (and what to a lawyer or informed citizen appear to be quite *subtle*) ways. Judges with high craftsmanship and statesmanship could quite effectively exercise political power while maintaining the illusion that they are really interpreting the law or the Constitution. Others, who believe in restraint, literally hypnotize themselves into believing that all they are doing is interpreting the law or the Constitution. The plain fact is that they are possessed of power and every act of decision is an act of exercise of that power which affects the community at large.

D. THE COURT AND THE PROCESS OF INSTITUTIONAL ACCOMMODATION

The *third* hometruth is that the Supreme Court is a major institution of national government. Its task is not merely to do justice between parties. This task is an important one, but equally important is to lay down, as it is said, the law. In other words, it is the exercise of the power of making law, and (distinctive to India) to make or unmake the Constitution. Because it exercises legislative and constituent power, and because it is and it feels somewhat vulnerable, the Court was, is and will remain sensitive to the claims of *other* major institutions of national government — the Union Executive and Parliament. Wherever possible, the rival claims of power have to be accommodated. Rationalizations in the form of legal argument are dependent upon this initial decision. Great and cogent examples of this process are found in recourse to prospective overruling and acquiescence doctrines in *Golak Nath*, the grant of wide powers to amend the Constitution, subject to some limitations in *Kesavananda* (a kind of "fly-now-pay-later" decision), the skilful responses to presidential references in privileges and special court matters, the striking assertion of the functionally non-federal character in many matters involving, ostensibly, questions of Centre-State relations and the impressively meandering developments in administrative law arenas. In each, the Court is skilfully managing shifts in the management of the distribution of power. Now it yields, now it asserts, now it equivocates — but in all cases it is there at the very heart of

the power game. Where it can get away with hegemony, it does; where it has to reach accommodation with other organs of government, it does; where it desires to alter the rules, it does so by serving notice (as in *Kesavananda* which is, in a sense, a disguised advisory opinion).

E. THE COURT IS KEPT BUSY BY THE STATE

The *fourth* hometruth is that the Court is kept busy by the State. The government itself, as the largest litigant keeps coming repeatedly before the Court. It is not only in distant villages that we find what the anthropologists identify as *mukkadama baz* and 'sea lawyers'. The government relishes litigation just as well.

Of course it is the duty of the government to help administration of justice and enforcement of the law. In this way, it gets involved quite naturally in keeping the Court busy. But this is not all. The Government passes on, increasingly, the burden of its decision-making to Court. How else do we explain the burgeoning law on Article 311? Which Supreme Court in the world has to settle seniority lists for promotions of clerks and officers or to supervise administration of disciplinary powers over civil servants? The executive, instead of engaging in self-correction and self-regulation, allows the burden of decision to be borne by the Court: the Court is to provide the correctives for the State's own inability to maintain fairness in its administration! There are other situations of inability to attain minimal fairness, consistent with the value of 'efficiency', which decisions on administrative law illustrate from day to day in abundant measure. Then there are situations in which governments — of States — contest cases right up to Supreme Court even when elementary issues of social justice are involved. A widow of a government employee driving a defective jeep of a government in famine relief work is unable to get compensation because the State pleads "sovereign immunity" as if the Directive Principles never existed! The Supreme Court has to settle the matter. It makes no difference which government is in power or how many "restorations of the rule of law" have or have been claimed to have happened. As recently as 1979, the

Supreme Court had an appeal by the State of Haryana, involving the contention that the widow of a person fatally injured by a State Transport bus cannot get minimal compensation from the Accidents Tribunal since she was too poor to pay the court fees! It is pointless to multiply examples.

But we must note the simple fact that the government keeps the Court busy, with big and small matters. This has at least two results. While the Court is well-nourished by demands of clarification and enunciation of the law, even the most activist of justices, with a penchant for policy-making and a good level of political maturity, are unable to develop or present a consistent level of juristic creativity and craftsmanship. The potential for impact on political consciousness and action that such justices have is drastically curtailed. By the same token, judges who are not so activist in orientation develop some kind of legalism, expedition and technocratic attitudes as a part of their working habits. This helps every one in maintaining, by and large, the existing "balance" of institutional relations of power between the Court, Parliament and the Executive.

The second consequence of all this is equally significant and relates to the same end of ensuring a broad status quo. This is that because of its litigative role, the Government is enabled to get a vital foothold in the Bar. It is able to distribute substantial patronage through government cases. This may not be malevolently designed. But it happens. Indeed, it takes on, by slow degrees, even the visage of a *natural* social fact, about which not much could be done. This also saps the cohesion and potential for system-challenge on the part of the legal profession.

F. INDEPENDENCE OF JUDICIARY FORBIDS INNOVATION IN THE STRUCTURE OF THE SUPREME COURT

We have noted how busy the Court is. Arrears in the Supreme Court are now, as it were, the "talk of the town". Justices of the Court have always reminded their critics, albeit informally, that they are overburdened with work and that for that reason comparisons with the American Supreme Court or other apex Courts are somewhat unfair. And so they are.

Yet nothing can be done about it either. Any alteration in the structure of the Court is ruled out; so are any demands in transformations of the role obligations of justices. Such alterations and demands are unfortunately too immediately convertible into threats to the independence of the judiciary. If the seniority rule is violated and junior associate justices are appointed as Chief Justices, the independence of the judiciary is threatened. If the less senior justices from the High Courts are elevated to the Supreme Court, the senior ones feel slighted and the Bar protests, as happened even recently in the case of the elevation of Justice D. A. Desai to the Court (*see* Dhavan & Jacob, 1978). When the Forty-second Amendment introduced the requirement of a seven-judge bench for reviewing the validity of Acts of Parliament, Supreme Court Justices expressed the opinion, in the course of their decisions after the emergency, that it was too cumbersome. Since the amendment was 'tainted' in the eyes of the new regime, the abolition of this requirement was unproblematic. But this important innovation was not even given a reasonable period of trial. It would have partly provided the solution to the problem of incoherence in the Court. This incoherence manifests itself in the lack of "precedent-consciousness", or a kind of amnesia in the Court with regard to its own wisdom in previous cases. (*See* Dhavan, 1977: Baxi, 1978); lack of corporate identity of the Court arising from fluctuating bench structure, poor craftsmanship and highly variable quality of legal norms made or enunciated by the Court. The requirement of a seven-judge Bench would have had the effect, even if this may or may not have been the real intention, of redressing some aspects of the problem of incoherence in the Court's work.

Critics of the Court, and justices of the Court, who complain about the variable quality of its craftsmanship ought to recognize that the bulk of these problems are associated with the total unresponsiveness to innovative proposals in the structure and function of the Court. Even if we leave aside the problems of coherence, corporate identity and craftsmanship, even in matters of review of capital sentence, matters of life and death for those involved, the Court has been unable to introduce any

appropriate innovation. It does happen, even now, that in the same month different benches of two or three justices reviewing death sentences reach diverse verdicts; while one bench upholds, the other commutes the sentence. The idea that review of death sentences should not fluctuate with the bench-structure has not quite registered itself; and any proposal that the Full Bench should sit in such matters is liable to dismissal on the ground that it would be too cumbersome and inefficient, especially given the problem of arrears. This factor is not salient when the Full Court is convened to hear matters of constitutional importance.

I do not wish to burden the text with proposals for innovation in the structure and functioning of the Court. Rather, I wish to highlight the fact that the structure of the Court is regarded as sacrosanct. And the real reason why it is so has to do with the preservation of *power* of the Court as an institution. And why this emphasis on power? That question brings us to the last (for the present purposes) truth concerning the Court, which a critic ought not to overlook.

G. THE COURT'S ROLE IN OPPOSITIONAL POLITICS

As a centre of power in national affairs, the Court is invariably drawn into the politics of the establishment as well as politics of the opposition. Whether Justices of the Court like it or not, understand it or not, care about it or not, the plain fact remains that the Court can be used for purely party political ends in certain situations beyond the control of the Court. Justice Hidayatullah has, with pointed reference to my writings on the Court and particularly to my critique of *Golak Nath* (*see* Baxi, 1967, 374-412) said, in public and private, that if in the United States every political question in the end becomes a judicial question, in India (thanks to people like Baxi, he says!) every judicial question becomes a political question!

I must confess that I am unrepentant, despite this affectionate reprimand. For, I do believe that all matters of high constitutional and legal policies are matters where law and politics cannot be kept apart, save by a superhuman and in the

long run, self-defeating effort, and even that they ought *not* to be kept apart. It is an entirely different matter if justices decline to acknowledge this plain fact in order to preserve the mystery and the mystique of judicial process in the apex Court. But the fact remains that in a one-party State (which India has largely been so far) opposition groups come to Court from time to time to secure relief from the hegemony of the dominant party. They may come for protection of rights or relief from tyranny or merely for using the Court as an extension of the media to get for their group, through Court proceedings, a national spotlight which may otherwise be denied to them. When opposition groups challenge the pursuit of certain policies or even values through processes of constitutional adjudication, the Court simply cannot give a neutral result. Some decision has to be taken either way; and legalistics apart, whichever way it is taken, it becomes a political resource for the group which wins. In the Indian context, the Supreme Court is not just a Court of the last *legal* recourse, but quite often it may also be the Court of the last *political* recourse. As Justice Goswami has said in the 'dissolution case' this Court is "the last resort for the oppressed and the bewildered" (p. 670).

One proof of this, and a fairly cogent one, is provided by the feeling, still very strong, that the Supreme Court let people down in the emergency, that it could have done something better or something more than the High Courts. The strictly legal aspects of this matter we will examine later. But this very persistent feeling indicates that we all look to the Court *somehow* to protect us from the tyranny of a majority party. How this is to be done is a very complex matter. But when it has to be done, it is the Court which has got to do it.

If we extend this a little bit, the tyranny of the majority for a whole lot of social groups has not begun with the emergency and does not end with its end. Whatever be our individual opinions on the matter, communists have come to Court as early as 1950 in *Gopalan* seeking protection from the tyranny of the majority; so have the 'Naxalites' through Article 22 jurisdiction; so have religious and cultural

minorities through Article 30; so have prisoners and undertrials in the post-emergency Court, and so may the RSS and the Congress (I). The emergency example varies from all these activations of the Court only in scale; in qualitative scope politically vulnerable groups seek through legal formulations of violations of rights an affirmation of a free arena for political action. All these groups upon securing this free arena may then criticize the Court for being this and that. But in order to challenge the hegemony of the dominant party they sooner or later come to the Court. And the Court must either help them or help the establishment in *result*, although in *reasoning* it may soar in the 'haven of legal conceptions'.

You may well say that this happens everywhere, including countries (like the United States) where there is a well-established two-party system. And you may add that all that is happening in India is because of the Bill of Rights and that the Court is merely enforcing it. How then do I maintain that the Court can be conceptualized as a centre of political opposition?

These objections are weighty. The United States experience shows that the repressive capacity of the State is not necessarily related to the nature of the party systems. Majorities could still tyrannize minorities. But the repression of the blacks was not merely a political phenomenon, it was a cultural and historical process as well. The Supreme Court there initiated a major change with the rules of a political game but it ultimately relied on a revision of the premises of the liberal politics as practised by the two major parties. Party politics got oriented on both sides on the issue of equality; it still is. The parties provided two big funnels, filtering the impact of a political decision of the Supreme Court. In India, there are too many funnels, big and small and their filtering capacities vary enormously. In India, the question is not just of equality—ethnic or any other—but primarily one of *survival* of political groupings outside the dominant parties. And the problem is also of the level of efficiency for survival in the face of constant dangers of cooption by the dominant party, of engineered or self-induced fragmentation

of the opposition units, and of repression, often ruthless, through use of legal and extra-legal force.

In such situations, it is natural that such groups seek legitimacy through favoured invocations of constitutional rights; only when this is ensured, they can turn to people. The Court represents to such groups an institution which they can seek to manipulate through legal categories to subserve their survival and power. When they succeed, the Court for those occasions gets coopted in the opposition politics, howsoever momentarily.

Even if you may question my analysis—which in part is an attempt at thinking aloud—you ought to concede the conclusion. Otherwise, you would need to produce a cogent explanation for the Court playing, in effect if not in intention, the role of guarded political opposition.

Let us take, for example, the issue of the amending power embodied in Article 368 of the Constitution. How do we explain that in 1967 the Court ruled in *Golak Nath* that Parliament's power of amending the Constitution cannot extend to taking away or abridging fundamental rights? It was a clear exercise of constitution-making power. The question is: why did the Court concede this plenary power to Parliament from 1950 to 1967? Was it because of the low competence of the Bar or the judges at that time? The question is so wrong that it refutes itself. Was it because the amending power was abused? But the Court did not think so for the first sixteen amendments in as many years; why was the Seventeenth amendment a more provocative abuse of amending power than any or all of the previous sixteen amendments? Was it because the *Golak Nath* Court comprised Justices with overt political leanings? The answer must be in the negative. If you keep asking and answering such like questions, sooner or later, you reach the heart of the question: which was expressed in *Golak Nath* as the "argument of fear". That argument, bluntly put, was simply that if there were no brakes, the engine of the amending power would soon overrun the Constitution. The brakes must be

provided somewhere; and the Bill of Rights was the place where the amending power should be stopped.

Ask: "why this argument of fear?" and you will find the real unwritten part of the majority decision. When the Justices referred tactfully to the German experience during the rise of the Nazi dictatorship, they were not talking of remote events in the past but a prospect of a not very distant future. They were expressing a profound political apprehension in the context of India. Jawaharlal Nehru was no more. The top echelon of the national freedom movement, and of Constitution-makers, was fast vanishing. There was in emergence a new breed of politician: the professional politician. *Golak Nath* was delivered on 27 February, 1967; the process of the Fourth General Elections which began on 15 February, 1967 ended a day after the judicial verdict. Justices might not (at various points of time when they composed their opinions) have been able to predict the exact outcome. But, like intelligent men, they must have anticipated the decline of the Congress Party which, in the event, only secured a bare majority (only 284 seats in Lok Sabha) and that no other party could win enough seats (i. e., fifty seats in Lok Sabha) to qualify as an opposition party. There was no knowing how political events would turn in 1967, and thereafter. This was the opportune time to at least immunize fundamental rights from the virus of amending power. If there was an emergence of a worthwhile opposition party, the majority Justices may have felt and thought differently concerning the future of constitutional polity and their role in it. But no such emergence was in sight. The Court intervened to ensure that second-generation politicians would not make fundamental rights into playthings. In this, the Court was playing a frankly oppositional role. This is why many critics of *Golak Nath* describe the decision as a self-inflicted wound. It was a wound, one surmises, because the critics felt that the Court was taking a specifically oppositional stand; the critics believed that the Court would have kept out politics altogether if it had conceded that amendatory power which knew no limits!

Whether or not it was a self-inflicted wound, many opposi-

tion parties and groups were not unhappy with *Golak Nath*. Within about four weeks of the decision, the opposition (seven political groups, including particularly, the Swatantra Party) considered inviting Chief Justice Subba Rao to accept the nomination to contest for Presidency against the Congress nominee, Dr. Zakir Husain. (Interestingly, the name of retired Chief Justice M. C. Mahajan was also prominent in the opposition list because he had delivered many dissents.) Chief Justice Subba Rao was to retire in any case on July 15, 1967. He decided to accept the nomination and resigned from his exalted judicial position on April, 11, 1967, after considering for two days the invitation of the opposition groups. The opposition stressed, besides his eminence, the fact that Justice Subba Rao had distinguished himself by his "non-partisanship" and "objectivity" as Chief Justice (Quraishi, 1973:80). These words meant merely that the opposition groups appreciated Justice Subba Rao's judicial ideology which was activist in battling statism and committed to preserve *all* fundamental rights, including the right to property. We need not go any further into the discussion of the electoral campaign or controversy which followed his decision to contest, as this is not germane to our present discussion. But here we wish to merely highlight the undeniable fact that the opposition groups evaluated Justice Subba Rao's (and the Court's) performance in the light of the opportunities it presented in terms of favourable political action. We also agree that

> it would not be wrong to say that Parliament was emboldened to question the judiciary's right to curtail parliamentary power as a result of Subba Rao's participation in the Presidential election (Id., at 81).

Indeed, the seeds of the idea of a committed judiciary were also sown as early as 1967 for *Golak Nath* appeared to many as a conservative decision as it entrenched the right to property, giving rise to an impression that the Court might invalidate legislation embodying the 'progressive' policies of the ruling party. The issue of social philosophy of judges began to be debated as a matter of considerable national importance.

Kesavananda was decided in a different political milieu.

Judicial decisions on privy purses and bank nationalization had not merely proliferated in party political debates but the Congress (R) manifesto for 1971 General Elections sought a 'mandate' for reassertion of Parliamentary Supremacy in the matter of amendment of fundamental rights. The Congress (R) won 350 seats in Lok Sabha. The Twenty-Fourth and Twenty-Fifth amendments to the Constitution, under challenge in *Kesavananda*, clearly sought to negate *Golak Nath*. Once again, the Court was asked to rule upon the limits of the amending power. In a delicately balanced, and inherently complex, response the Court conceded wide amendatory powers, lifting the technical bars placed by *Golak Nath* in its interpretation of the word 'law' in Article 13, but at the same time widened the scope of judicial review on the notion of the 'basic structure' to which all *valid* exercise of amending powers must conform. For the majority justices again the argument of fear was relevant in deciding the issue. The majority was clear that the representatives of people cannot be trusted to uphold the basic structure of the Constitution in the Indian conditions if they were given unbridled amending powers: the Court must have a final say in any revision of the Constitution which departs from the basic structure which it, and it alone, can identify from case to case.

Why could not the Court entrust absolute amending powers to the elected representatives of the people? There were many answers in "majority" opinions and many refutations of these in "minority" opinions. But Justices Hegde and Mukherjea give a distinctly political answer:

> When a power to amend the Constitution is given to the people, its contents can be construed to be larger than when that power is given to a body constituted under that Constitution. Two-thirds of the members of the two Houses of Parliament need not represent *even the majority of the people in this country*. Our electoral system is such that even a minority of voters can elect more than two-thirds of the members of either House of Parliament... That apart, our Constitution was framed on the basis of consensus and not on the basis of majority votes. It provides for the protection of the minorities. If the majority opinion is taken to be the guiding factor then the guarantees given to the minorities may become valueless.... *Therefore, the contention on behalf of the Union and States that two-thirds of members in the two Houses of Parliament are always authorized to speak on behalf of the entire people of this country is unacceptable* [(1973) 4 SCC at 481: emphasis added].

What is being said here in plain prose is that the Congress (R) which won 350 seats was in effect not a representative of the people since it won only 43·64 per cent of the total national vote; and that, in a sense, it was a minority government. Justice Hegde in saying this denies, in effect, the legitimacy of such a government when he *holds* that it "cannot speak on behalf of the entire people of this country". In short, the Government which won the 1971 election cannot be said to "represent even the majority of the people in the country". As a piece of cold, sobering statistics, this is undeniably true; but both law and the Constitution legitimate this kind of situation. I do not know of any example in Anglo-American judicial history where senior justices of the Court have so overtly denied legitimacy to a duly elected majority in Parliament.

Even Lord Devlin in his *extra-judicial* comments on *Heaton's* case did not go so far as Justices Hegde and Mukherjea. Referring to the Industrial Relations Act of 1971, Lord Devlin said that it was an example of "non-consensus law", something in contrast to "consensus law" embodying a result which people were "generally prepared to put up with". He argued that nonconsensus law should not be enforced by Courts. He observed:

> It is imperative that the high powers (of Courts) should not be used except in support of consensus law. If the judges are to do more than decide what the law means, if they are also to speak for it, their voice must be the voice of community; it must never be taken for the voice of the Government or the voice of the majority.

What Lord Devlin was saying was in relation to judicial power to enforce the law which was highly controversial; what

he was asserting through this distinction between 'consensus' and 'non-consensus' law was really the protection of Courts from an intolerable position of having to enforce the laws, which on his premises, was not supported at all or substantially, by community consensus. What he was saying is really that if the Courts were to be put to a choice they ought to side with the people, and not with the government. As he said,

> the prestige of the judiciary, their reputation for stark impartiality to be kept up in appearance as well as in fact, is not at the disposal of the government; it is an asset which belongs to the whole Nation.

However controversial, the "importance of Lord Devlin's analysis rests in his denial of the neutrality of the judiciary in matters like the criminal law" (Griffith, 1977: 192). The number of non-consensus laws, in the strict sense, as laws which people simply won't put up with, must be limited to very few.

Lord Devlin's attack is not, then, on the legitimate authority of Parliament in general but specific exercise of authority in regard to criminal enforcement of a labour relations law, which involved major socio-political groups in sharp and continuing confrontation. His limited aim was to save the judiciary from being *used* as a political arena by *either* side.

What Justice Hegde is saying in contrast is far more courageous or reckless (depending on your point of view). He is not talking about exercises of legislative power by Parliament. Nor is he concerned with the specific idea that the prestige of the judiciary is a national asset. Justice Hegde is saying, in the context of the limits of constituent power, that the constitutionally prescribed majority is neither representative of the entire people nor can it authoritatively speak for the people. The scope of this political assertion is so wide as to strike at the very roots of the idea of the representative government. (*See also* Tripathi, 1975, 35-36);

Justice Hegde was due to retire on 11 June, 1974; he would have retired as the Chief Justice of India as Justice Shelat had only a brief term of few months in that office (until 16 July,

1973). But the Chief Justiceship went to Justice Ray and Justice Hegde resigned, with other affected justices, in protest. Without going into the merits of the "supersession" controversy, one may still ask: "Was it good politics on the part of these two senior justices to hold as they did"? When, indeed, will this criteria of genuine representation be satisfied, if ever, in India? Even the Sixth Lok Sabha does not wholly satisfy these criteria: the Janata-CFD alliance won 298 seats whereas the Congress won 158 seats. Percentagewise, the former polled 43·17 per cent of the total votes cast and the latter polled 34·54 per cent.

Justice Hegde's observations may not justify the abrogation of the convention of appointing the seniormost justice of the Court as Chief Justice of India. But if the government of the day began to speak in terms of "committed" judges since then this was at least understandable. It was one thing to deny Parliament the last word in the matter of constitutional change; and quite another—and devastating—to deny the legitimacy of the constitutionally prescribed procedures in fulfilment of which the then government was deemed to be the majority government. Whatever else the notion of "commitment" meant, and it was clarified at one stage that it meant commitment to the Constitution, it is clear that the kind of comments made by Justice Hegde even transcend the bounds of what I mean by constitutional politics of the Court.

Once again, for my present purposes, I would have done well if I have been able to get the idea across that if politicians invoke the powers of the Court for their own purposes, the Court cannot avoid politics in deciding the issues involved. And, sometimes the Court may be seen to indulge in the politics of opposition. If the Court consistently avoids doing so, in a largely one-party system, it risks irrelevance in national affairs. But if it does not seem to try to avoid such politics, it risks controversy. If I have to make the choice for the Court I would say: "Please risk controversy rather than irrelevance". I feel encouraged by the Court's performance thus far to offer this gratuitous advice. I have no doubt that at worst, the Court

of the future may alternate between irrelevance and controversy. But at its very best too the Court will assert its political relevance. If all this is unconventional, let it be so unless we can really say that the wisdom offered to us by convention is more apt to a traumatically changeful India than that which is to be gathered from self-conscious experiments in wielding political power by the Supreme Court.

H. EPILOGUE: A PLEA FOR POLITICS

The real problem with many of us is our ambivalence to politics. We like to "enjoy the fruits of politics without paying the price or noticing the pain". We like to "honour the fruits but not the tree". We want limited government, representative institutions, liberty and justice — which can only arise through vigorous practice of politics — but we want to "preserve them from further contact with politics". The apolitical attitude is marked, essentially, by "self-righteousness than prudery" (Crick, 1962 : 118).

Sometimes the ambivalence breeds a distaste of politics. We detest politics from the bottom of our hearts for it represents to us merely,

> all those noisy and incoherent promises, the impossible demands, the hotchpotch of unfounded and impractical plans .... opportunism that cares neither for truth nor justice, the inglorious chase after unmerited fame, the unleashing of uncontrollable passions, the exploitation of the lowest instincts, the distortion of facts . . . all that feverish and sterile fuss.

Before you nod your heads in wise agreement, let me remind you that this is a quotation from Dr. Salazar, the Portuguese dictator ! (Crick, 1962 : 1).

Undoubtedly, politics is all this ; but as Aristotle long ago realized, politics arises from a diversity of groups and interests, of traditions and aspirations "within a territorial unit under a common rule". Politics, he said, was only one way to secure order through conciliation of warring interests and values and to solve the problem of order. The alternatives to politics are

oligarchy or tyranny. "The method of rule of the tyrant and the oligarch is quite simply to clobber, coerce or overawe all or most of other groups in the interest of their own." In contrast

> the political method of rule is to listen to these other groups so as to conciliate them as far as possible, and to give them a legal position, a sense of security, some clear and reasonable means of articulation, by which these other groups can and will speak freely. Ideally, politics draws all these groups into each other so that they each and together can make a positive contribution towards the general business of government, the maintaining of order (Crick, 1962 : p. 15).

Politics in this sense is an *activity* "by which differing interests within a given unit of rule are conciliated by giving them a share in power in proportion to their importance the welfare and survival of the whole community" (p. 17). Or, in other words,

> politics is to be seen neither as a set of fixed principles to be realized in the near future, nor yet as a set of traditional habits to be preserved, but as an *activity*, a sociological activity which has the anthropological function of preserving a community grown too complicated for either tradition alone or pure arbitrary rule to preserve it without the undue use of coercion (pp. 19-20, emphasis added).

I would urge you wholeheartedly to read Professor Crick's little book *In Defence of Politics*, from which I have quoted, since as he says, "boredom with established truths is a great enemy of free man". The general argument that politics is an activity, of course, does not tell us much as to the kind of politics which is apposite to men of law or judges or indeed for society as a whole. But what is important in this thesis is that politics as an activity of conciliating interests without "undue" violence remains, warts and all, the only alternative to tyranny and totalitarianism.

There may be different ideologies in constitutional politics; conservatism, liberalism, socialism, populism (and many others).

The ideologies which the Court espouses will invariably be those of its individual justices from time to time. Perhaps, it is possible to generalize somewhat and say that, by and large, the class background of judges will create a tendency towards promotion of that kind of order which is broadly capitalist as has been argued, quite cogently, in a little known essay by Sobhanlal Datta Gupta entitled "The Supreme Court and Indian Capitalism". (1974 : 167)

One may say, as I am going to say in my third lecture, that the post-emergency Supreme Court is moving towards a broadly populistic politics. But such statements could only be made in terms of dominant trends from time to time in the overall functioning of the Court. They can be quantified by jurimetrics, which has already been applied to the Indian Supreme Court, although in a preliminary fashion (*see* Gadbois, 1969 : 317, 1974).

But the possibility of a fruitful analysis of the activity of the Court can begin only when we broadly agree that judicial process at the Supreme Court (and appellate) levels is a species of political process and that constitutional adjudication is essentially a political activity expressed through the medium of legal and jurisprudential language and action. It is only when we accept that the Court is *doing* politics, in this sense, that the question can arise as to what *kind* of politics it ought to do in a free society : the politics of justice or politics of power? the politics of order or that of change? the politics of status quo or that of innovation? the politics of survival or that of aspiration? the politics of establishment or that of opposition? the politics of today (the immediate present) or of tomorrow and the day after (the immediate future)? the politics for the people or politics *against* the people? the politics of hope or the one of despair?

On these issues there may be many answers, as the very history of the Supreme Court demonstrates. The disputation between justices of the Supreme Court in *Gopalan, Golak Nath, Kesavananda, Shiv Kant, Maneka Gandhi*, the *Dissolution* case, and *Karnataka* case, all testify (among a whole mass of others) the concern of the Court as to the *kind* of politics it ought to engage in. Even the Court has now begun to recognize its political responsibilities quite explicitly. For example, in the *Dissolution* case the Court refused to accept the contention that dissolution of nine State Governments in the wake of the 1977 elections was a political question from which Courts ought to desist. The Court said :

> Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, *fail* to be political. A constitution is a matter of *purest politics* . . . [(1977) 3 SCC at 660, per Bhagwati J. ; emphasis added].

It went on to say "particularly in the context of recent history" that the Constitution is the *supreme lex* and no branch of the government is "above or beyond it". And the Court is the "ultimate interpreter" of the Constitution : it is for the Court "to uphold constitutional values and to enforce constitutional limitations. This is the essence of the rule of law". (Id., p. 661)

But in the nature of things the "purest politics" cannot be really and wholly "pure", as the following observations of the Court demonstrate :

> . . . [I]t is the accepted fact of constitutional interpretation that the *content* of justiciability changes according to how the judge's value preferences respond to the multi-dimensional problems of the day. An awareness of history is an integral part of these preferences. In the last analysis, the people for whom the Constitution is meant, should not turn their faces away from it in disillusionment for fear that justice is a will-o'-the-wisp (per Chandrachud, J. at p. 646 ; emphasis added).

Please note carefully what the Court is saying. The Court is the ultimate "arbiter" on questions of allocation and exercise of political power. It is the "*ultimate* interpreter" of the Constitution and the rule of law. In that role, it is the Court which determines the "*content* of justiciability" through changing value-preferences of the justices who comprise the Court from time to time. The Constitution is what the judges say it is ;

and judges are not bound to follow what they themselves or their brethren have said before. It was, I think, Justice Learned Hand who said once that judges take oath to preserve and protect the Constitution, not an oath to preserve and protect the predecessor's interpretation of the Constitution!

Like all law-making, judging (as Lord Wright memorably observed) is an act of *will*; and that act arises through the political activity of 'balancing' and 'conciliating' conflicting interests (or repression, if you prefer that way of thinking). The taming, the disciplining of that political will, the will to power, is, ultimately, the enduring problem of human civilization. Informed evaluation of political action, a continuing exposé of reality as it is untinged by ideal visions, proposing agenda of alternatives and the capacity to enter into an effective dialogue with those who wield power by those who do not are, ultimately, the basic ingredients in any exercise in the taming of political will in a free society. There are no doubt other strategies: terror, insurgency or revolution. Each one has to choose. And the choice is very, very difficult. That is why the great Einstein had to acknowledge that "politics is harder than physics". At any rate, the critic of the Court is engaged in a phenomenon no less complex than nuclear physics; and he remains as responsible for its benign and sinister consequences as the scientist.

So, for those of us in law who are accustomed to begin thinking only when there is a citation of authorities, and for all others, the question is: what kind of politics ought the Court engage in? It is not *whether* it should engage in it *at all*.

I do believe that unless the kind of questions raised here are tackled all our talk about relating law to social change is empty rhetoric. And our mindless mouthing of this rhetoric is the gravest threat there is to constitutional democracy in this country: a cause to which Mehr Chand Mahajan dedicated all his life.

Lecture II

THE TWILIGHT OF LEGITIMACY: THE SUPREME COURT AND THE EMERGENCY

A. THE THREE PHASES OF THE EMERGENCY

Like most Indians, justices of the Supreme Court of India were taken unawares by the decision of Mrs. Indira Gandhi to declare an emergency on June 25, 1975. Justices of the Supreme Court, again like many middle-class Indians, had all along assumed that something like an all-out authoritarian rule just cannot emerge in Indian polity. Nothing very drastic had happened in the national emergencies proclaimed earlier, which were related to more serious situations of aggression or hostility by neighbouring nations. But as events unfolded, they watched from their Olympian heights with increasing anxiety the widespread arrests, the regime of press censorship, the strengthening of MISA, the expansion of the Ninth Schedule, retroactive changes in election law, numerous amendments to the provisions of the Constitution. None of them openly welcomed the emergency. And, like most Indians, they were not easy in their minds concerning the imposition of such a drastic regime of emergency. They felt that it would be wise to wait and watch. They must have felt embarrassed at the fact that the attack on the life of Chief Justice Ray should have featured so prominently in Mrs. Gandhi's addresses to the nation as an aspect of justification of the emergency. They too must have hoped, wished and prayed like many Indians that the emergency would vanish soon, and as abruptly as it was imposed. There was uncertainty, confusion and massive propaganda mixed with insidious rumours about the shape of things to come.

An adequate account of the 1975-77 emergency has yet to be written. But from a juristic standpoint, one may see at least three distinct phases of the emergency. The first phase lasted from June to December 1975. This phase was marked by an attempt to impose submission and evoke fear among the people. In a sense, the police state was being institutionalized, at least

for politically articulate, opposition-prone and otherwise vulnerable people. At the same time, a massive drive for the legitimation of the regime was launched through the enunciation and pursuit of the Twenty-Point Programme. There was something for everybody in this package. A wide spectrum of intelligentsia, including judges, lawyers and jurists, was gradually persuaded that the emergency was not necessarily an unmitigated evil insofar as it was a transient affair, marked by a determined effort to fulfil the constitutional pledges to the depressed classes of Indian society. It was in this period that the Supreme Court was required to pronounce its decision on the validity of the retroactive changes in the electoral law and of those aspects of the Thirty-Ninth amendment to the Constitution which had a bearing on the election case.

The second phase of the emergency, again from the limited standpoint of legal developments, is the period from January to June, 1976. This period is characterized by a movement to re-examine and 'reform' the Constitution. On the very first day of the year, the Congress Party in a resolution passed at its 75th annual session resolved that the "Constitution must serve as an instrument of change" and should therefore, be comprehensively re-examined "so that it may continue as a living document, effectively responding to the current needs of the people and the demands of the present" The opposition governments in Gujarat and Tamil Nadu were dissolved and the States were brought under the President's rule. On February 4, 1976, the life of the Lok Sabha was extended by one year and on February 26, the Swaran Singh Committee was formed by the President of the Congress Party. The period is marked by the search for a new constitutional consensus and a general assault on the powers of courts, especially the writ jurisdiction of High Courts. The real reason for the assault on writ jurisdiction becomes available when we recall that nine High Courts ruled that they had the power to grant *habeas corpus* for any other purpose even if the Presidential order suspended the right to move the Court for enforcement of Article 21. Some High Courts also showed sturdy independence in censorship matters. Sixteen High Court justices were transferred without their

consent in this period. This is the period in which several High Courts granted relief to detenus in the nature of short-term releases from detention, according them the status of civil prisoners. It is in this period that the *habeas corpus* case was heard and decided upon by the Supreme Court. The ominous Fortieth Amendment was passed by the Lok Sabha.

The third phase of the emergency lasts from June 1976 to March 20-24, 1977. The early phase of this period is marked by the discussion on Swaran Singh proposals and a national 'debate' on the Forty-fourth Amendment Bill, which is passed and receives Presidential assent on December 18, 1976. During this period, demands are made by three State Legislatures (U. P., Punjab and Bihar) for convening of a Constituent Assembly. On November 5, the Lok Sabha extends its life by yet another year; on November 9, the Law Minister Gokhale assures a full review of judicial system with a view to restructure it. The second part of this phase is marked by bringing into operation on January 3, 1977, 36 out of 59 sections of the Forty-second Amendment (followed by another batch of provisions on February 1, 1977). But the crucial aspect of this phase is the announcement, on January 18, of the Lok Sabha elections and the supersession of Justice Khanna by the appointment of Justice Beg as Chief Justice of India. The phase culminates in a massive rout of the Congress Party in the sixth general elections and formation of the Janata Government.

We have, in identifying these phases, not really attempted a full history of the emergency, as this is a complex task, and one not wholly related to our present focus. But we have arbitrarily highlighted some aspects of the emergency with a view to grasp the specific political configuration in which the Supreme Court went about its job. Analyses of judicial responses to emergency, or of the emergency as such, which treat it as one monolithic event, overlooking the inner dynamics of the situation, tend towards pseudo-history or, at any rate, fail to unravel the unfolding of sequence. They, accordingly, fail to provide us with a sensitive grasp of the political context of judicial functioning.

B. THE SUPREME COURT IN AGONY

In the first phase, there was massive confusion and uncertainty, tinged with fear. There was no knowing whether the Supreme Court building might be locked on one "fine" morning. There was a feeling pressing upon the Court, in a diffuse and subtle but unmistakable manner, that its actions were being watched by the regime and there were hints that judicial power might be curbed in the days to come. Adequate preparations were made through changes in the election law to ensure that the Court's discretion was confined to a point where it was left with no other alternative but to confirm Mrs. Gandhi's election as valid. The regime signalled to the Court that it was in no mood to take a chance: Article 329A (4) of the amended Constitution was a "let-you-know just in case" kind of note addressed to the Court. The Government reckoned that if by any chance the Court was persuaded to deny the power to retroactively amend the election law, which it had so far conceded to Parliament, the constitutional amendment should help achieve the same result, as, with the exception of Justice Khanna, all other senior justices had ruled in *Kesavananda* that Parliament's power to amend the Constitution was unlimited. While the regime was not unduly worried about the possibility of an adverse verdict, it still thought it worthwhile to shackle the Court in its exercise of constituent and judicial powers. For, if the strategy of the government failed on both counts, the regime would stand deprived of constitutional legitimation and this would generate some international and national embarrassment and pressures within the regime to be more overtly and crudely authoritarian. This would have its own dynamics, for not all supporters of the regime were equally convinced about the need and desirability of the emergency and, at any rate, its expanding scope. The top echelon of the regime wished the Court, as it were, to behave. If it did, they hinted, it might survive: if it did not, they said, we cannot control the consequences of the Court's indiscretion or valour.

The Court, as we shall examine in detail, yielded in substance to the regime's demand in the interests of self-preservation. In this, the body of men who comprised the Court as a major institution behaved no differently from those who were at the helm of other major institutions of society. And yet the Court asserted with great force the power to invalidate a constitutional amendment. While this had no immediate political significance, it did mean that the Court retained its power to decide in the future the scope of Parliamentary power to amend the Constitution. This was clearly unacceptable to the Government, which had, together with all major opposition parties before the emergency, asserted the supremacy of Parliament in the matter of basic changes in the Constitution. In keeping with the national political consensus forged before the emergency, the Government sought a review of *Kesavananda* soon after the *Indira Gandhi* decision. An obliging Chief Justice convened a Full Court but somewhere along the line the endeavour appeared too difficult and the Full Court was dissolved.

The second phase of the emergency contained clearer messages for the Supreme Court. On the constitutional front, there was the resolution of the 75th annual session of the Congress Party calling for a comprehensive review of the Constitution. The life of Lok Sabha was extended by another year, so that any emerging amendments could be enacted. The nature of the changes was, as yet, uncertain. Towards the end of December, a strange, anonymous document was in free circulation. This proposed a Presidential form of Government. Of particular interest to the Supreme Court was the specific proposal in Article 83 which contemplated the creation of the Superior Council of Judiciary, consisting of fourteen members, with the President as the head of the Council and the Minister of Justice as its Vice-Chairman. The Council was to have representation from the bar and four judges from all levels of the judicary and six persons elected from the National Assembly. All these were to be term appointments. It was difficult to know whose ideas the document represented but I recall that at that time everyone thought that this document had some support from the top echelons of the regime. The lamented Advocate C.T. Daru in Ahmedabad gave currency to the document with his own denunciation of it and was promptly arrested and detained.

The Bar Council of India convened an emergency meeting on December 27, 1975 and in a very moderate resolution urged that the "proposed amendments if carried through would tend to destroy democracy and every other basic feature of the existing Constitution and to substitute an authoritarian and totalitarian form of Government without removing poverty or doing any good to the common man". The Council solemnly advised the "authorities . . . not to make such drastic changes particularly during the emergency and to submit the proposals to national debate".

It was during this phase that the Court had to consider the appeals from the *habeas corpus* decisions of several High Courts which maintained that they had under Article 226 the necessary powers to issue the writ in case of ultra vires or mala fide detention orders. During the pendency of the appeals, several sections of the MISA were amended with the clear objective of rendering these decisions infructuous on appeal.

The Court must also have been aware that the Chief Justice of India had, during this period, sanctioned "mass transfers" of several, in fact sixteen, High Court judges. Perhaps, the specific suggestion of the Swaran Singh Committee that the Supreme Court should sit in circuit benches in various parts of India was also by then in the minds of the justices. It was in this atmosphere that the Court was asked to rule on the scope of the Presidential Order suspending the right to seek judicial relief for the enforcement of certain fundamental rights.

The third phase of the emergency troubled the Court in less drastic ways. But it still brought before it several appeals from the States against High Court orders granting various reliefs to detenues while in detention. The Court not merely granted stay orders but ultimately ruled that High Courts had no power to give such relief. The other, and more difficult situation, involved the appeal by the Union against the decision of the Gujarat High Court voiding the transfer of Justice S. H. Sheth to Andhra Pradesh High Court from the Gujarat High Court. In a decision showing great courage and delicacy,

Justices J. B. Mehta, A. D. Desai and D. A. Desai ruled that this was, for various reasons, impermissible under Article 222 of the Constitution. This decision was rendered on November 4, 1976 (17 Guj L R 1017).

The appeal was embarrassing, particularly for the Chief Justice of India as he was made a party to the proceedings before the High Court and there were observations in the High Court's decision almost amounting to strictures at the failure, by the Chief Justice of India, to file an affidavit and in agreeing, when the President "consulted" him, to the transfer without applying his mind. For obvious reasons, the Chief Justice did not give "right of the way" to this appeal, even though it raised vital questions concerning the independence of the judiciary; the matter was treated routinely and heard and disposed of in August-September 1977, after the revocation of the emergenecy, and the retirement of Chief Justice Ray.

Institutionally, the most crucial aspect for the Court was the appointment of Justice M. H. Beg as the Chief Justice despite the fact that Justice Khanna was senior to him. The Government was acting in the spirit of the 1973 appointments when the convention of appointing the senior-most Justice of the Supreme Court as the Chief Justice of India was consciously abrogated. Justice Khanna resigned in protest but he made his resignation operative only from March 12, 1977 as he availed his leave prior to retirement. No other Justice of the Supreme Court protested. If justices of the Supreme Court had felt strongly about the abrogation of the convention of seniority, they had before them a politically more meaningful context in early 1977 than in 1973 to register their protest, as the Sixth General Elections were already announced. Of course, no one had imagined that the results of that election would be what they in the event turned out to be. But a corporate protest by justices of the Supreme Court would have certainly been a major event on the eve of the election; the protest behaviour may have moved from a collective resolution expressing regret at interference with the principle of seniority at one end of the spectrum to a credible threat of mass resignations at the other.

But nothing of this sort happened. As in 1973, so in 1977, the justices of the Supreme Court have by their behaviour, established the hard reality that regardless of the debate at the Bar and in media concerning the relevance of the seniority principle to the independence of the judiciary, most members of the Court have not accepted the position that the seniority principle has any significant bearing on the value of the independence of judiciary. If the immediately involved brother justices resign, it is a matter of their own dignity and choice; it raises in the minds of the less senior justices no profound agitation as to the impact of the action of the Government on the independence of the judiciary.

In each of these phases of the emergency, the Supreme Court was confronted with distinctive problems, the like of which had never arisen (excepting the "supersession") before. The highest courts in developing societies (like Pakistan, Sri Lanka or Nigeria) were confronted, very early in their evolution, with chronic problems of doing justice in politically volatile and institutionally insecure contexts. They found themselves in situations of civil war or military regimes or sudden and abrupt changes of (*not* in) Constitutions. The Indian Supreme Court matured in relatively untroubled political contexts. The magnificent edifice of law that it patiently developed over a quarter century was equipped to handle, more or less, problems in the allocation of power and its exercise within a stable constitutional context. Its attitudes, personnel and the repertoire of juristic techniques was geared to consolidate its role as a centre of political and constitutional power and legitimation, and even to expand that role to its maximal limits. Even during the heyday of the controversy over the "committed judges" and "committed judiciary", the Court faced no significant challenge to its unrivalled position as an arbiter of constitutionality of the exercise of State power. But the Court was faced for the first time in its history, in the 1975-77 emergency, with credible threat to its survival as a major institution of the Government. Nothing short of the very survival of the Court seemed then to be at stake. Later-day critics of the Court's performance during the emergency should not ignore this fact. If they do, they forfeit the title of serious social analysts.

Apart from the peculiar nature of challenge arising from the logic of events in 1975-77, the Court was, by various legal strategies, circumscribed in its discretion, power and function. In the specific situations coming before it, the law and even the Constitution were amended with clear objectives of producing a pro-regime result. The past decisional law was, most often, kept carefully in mind (as for example in the drafting of the Presidential Order, amendments to the MISA, retroactive election law changes, the liberal use of the Ninth Schedule). Whenever the High Court decisions favoured the detenues, the MISA was carefully scrutinized and changes were made even during the pendency of the appeal by the State to the Supreme Court. The MISA was amended by Act 39 of 1975 on August 5, 1975; by Act 14 of 1976 on January, 25, 1976 and by Act 78 of 1976 on August 25, 1976. The amendment to the MISA enacted on January 25, 1976 was made specifically in response to the various High Court decisions made during the period September-December 1975, and made applicable retrospectively with effect from June 25, 1975! Those who compare the performance of the High Courts in the *habeas corpus* decisions with that of the Supreme Court overlook that the former did not consider the validity of Section 19A(9) of the MISA introduced by an Ordinance some time towards the end of 1975 and enacted by Parliament on January 25, 1976. Of the two High Courts which had occasion to consider this section, one (Rajasthan) upheld it as valid and another (Bombay: Nagpur Branch) sought to read it down while also conceding its validity. We will turn to the details a little later in this part. But for the present the main point is that slowly legislative exercises were pushing the Court effectively to a point of no return.

Thus, the major areas of the law and Constitution affected substantially by the emergency amendments were the very areas in which most people then, and almost all people now, expected a vigorous assertion of judicial power by the highest Court in

the land. But such assertion of power would have in turn required from the justices a massive disavowal of their positivistic and legalistic heritage, since anything short of this was incapable (as we shall see in our analysis of Justice Khanna's dissent in the *habeas corpus* case) of producing any but the most marginal change and relief from the tyrannical aspects of the regime of the emergency. Surely, the Court could have repudiated the wide powers of retroactive legislation which generations of its justices had clearly and categorically conceded to Parliament on their reading of the Constitution. Thus, the changes in election law could have been invalidated, and so also the retrospective changes in the MISA, by the simple-looking change of mind on the issue of such power on the part of the justices involved. But such doings, in those days, would have most definitely exposed the Court to a charge of playing politics in the guise of law and adjudication and justified, to some extent, substantial and far-reaching restrictions on the constitutional status and powers of the Court. It might thus not merely have imperilled the Court's existence but also have accelerated the already powerful movement to have a new Constitution. Whether or not such events would have actually come to pass, just no one could tell. But the apprehensions were real and tangible and were a part of the definition of the situation by justices of the Supreme Court. A student of the Supreme Court's performance during the emergency cannot altogether ignore this context of constraints and the growing agenda of apprehensions. His evaluation of the Court in this period must be based on facts and realities of the time as seen by the judicial actors then and not as they appear to him or others, including the Justices who now in an introspective mood offer retrospective modifications of their own subjective definitions of the situation as they saw it *then*.

Moreover, in order to obtain a proper perspective of the Court during the period of the emergency one has to go beyond the emergency-ridden areas of law and the constitution to areas which were unaffected, at a legal level, by the emergency. One has to look, for example, at the craftsmanship and creativity of the Court in the area of compensatory discrimination:

the celebrated decision of the Court in *State of Kerala* v. *N. M. Thomas* [(1976) 2 SCC 310] was delivered in the first phase of the emergency. A deeply moving and cogent case against capital punishment was made on August 1, 1975 in *G. Krista Goud* v. *State of A. P.* [(1976) 1 SCC 157], where the Court speaking through Justice Krishna Iyer went so far as to indicate and even caution that the clemency power of the Executive is not an absolute power beyond the pale of judicial scrutiny: the Court said: "Absolute, arbitrary, law-unto-oneself mala fide execution of public power, if gruesomely established" will necessarily create a situation in which "the Supreme Court may not be silent or impotent" (p. 161). On December 12, 1976 the Court marched ahead with the widening of the definition of "State" under Article 12 in *Vaish Degree College* v. *Lakshmi Narain*; and on October 6, 1975, it held the Indian Standards Institution to be an industry under the Industrial Disputes Act [(1975) 2 SCC 847]. Each of these illustrations may be controversial and one may find many more such important decisions in areas of law and Constitution unscathed by the emergency legal regime. The capital point here is that the Court continued to lead the law in new directions, showing its vitality and even exuberance in the process. There were no sharp discontinuities in the manner in which the Court approached its everyday tasks. It was because of this that the same vigour was expected of the Court in dealing with the emergency-ridden areas of law and the Constitution. At the same time, it might have felt that a frontal opposition with the regime would invite emasculation of its own powers even in regard to areas in which they were hitherto relatively free to adjudicate for the common weal.

C. THE BESIEGED JUSTICES

So far we have been looking at the Court in the abstract, as an ongoing institution. But the Court is also a human institution with shifting personnel and changeful patterns of relations among the various justices. In a sense, the focal point of these relations is the Chief Justice of India, who though *primus inter pares* has a considerable role in maintaining a cohesive functioning of the Court in normal times. In abnormal

times, the responsibilities are even heavier: the Chief Justice of India has to be anxiously vigilant in defence of the Court and the values of the Constitution. Chief Justice Ray, who was no stranger to constroversy, suddenly found himself on the declaration of emergency in an awkward position. While he was as helpless as his brother Justices as to the turn of events outside the courtroom, the demands on his leadership potential were increasingly heavy. He had to uphold the authority and the dignity of the Court at a time when the regime was moving with thoroughgoing swiftness towards closing the doors of discretion and power of the Court in vital areas of its jurisdiction. Any Chief Justice of India would have found himself in an unenviable position: Justice Ray's position was a little more so.

This was because of the fact that the Government might have misconstrued where his sympathies would lie in a crisis. After all, it had chosen Justice Ray to Chief Justiceship and paid not altogether a minor political cost in the controversy that followed. The Government had done so because in three major decisions it found Justice Ray adopting the line of argument that it had advanced. Justice Ray had not made any protest when offered the position of Chief Justice. Mrs. Gandhi and her advisers might have felt that with Justice Ray at the helm of affairs they would not encounter much judicial opposition. Whether or not such perception on their part was wholly justified is another matter but it is clear that the expectation of the Government that the Chief Justice of India be at least consistent with his own attitudes and holdings introduced a significant element of tension within himself and in his relations with other justices.

Perhaps more than a merely diffuse demand that the Chief Justice be self-consistent despite the changed situation, was involved, though what that could have been we shall not know for quite some time. But if we analyze the difficulties he ran into when he convened the Full Court to review *Kesavananda* (we will examine this later) we get the feeling that the possibility of some kind of more direct pressure cannot be wholly ignored.

The emergency was obviously not the most congenial type of situation for *Kesavananda* review, although most dissentient Justices in that case were now not merely senior Justices but had also to apply its holding in the *Indira Gandhi* case. The fact that the Chief Justice ordered a review at that moment of time does not make any sense, except on the hypothesis that he was responding to the Government's request to do something about *Kesavananda*. The suspicion that the Chief might have been subjected to some kind of pressure from the regime becomes strengthened by the fact that he, upon being consulted by the President, agreed to recommend transfer of 16 judges, in violation of a quarter century old convention that no High Court judge shall be transferred without his consent. We do not know whether he consulted brother justices and if he did, who they were and what advice he received and accepted or disregarded. The unpleasant fact that remains is that he agreed to the mass transfers.

One can explain these and related events only on three hypotheses: one, that the Chief Justice was under some pressure or threat by the regime; two, that he genuinely believed that what he was doing was the best under the circumstances; and three, that he just did not appreciate the enormity of what was involved. Clearly, the third hypothesis cannot be extended to a man who held the position of the Chief Justice of India, even if one may say that Justice Ray does not emerge, on his overall performance, as a judge with any great sense of history or as one gifted with high judicial craftsmanship and creativity. But still the enormous political significance of whatever was involved during and even before the emergency could not have escaped him altogether.

If Chief Justice Ray genuinely believed, as our second hypothesis stipulates, that whatever he was doing was a part of his moral responsibility in the job and that pragmatically it was the best that could be done, one can understand and even sympathize with him to a point. One can understand the actual decisions he gave in *Indira Gandhi* and the *habeas corpus* case. But how can one condone his convening a Full Court

for *Kesavananda* review and his acquiescence in the transfer of sixteen High Court justices? These two related to the nature of judicial power and the independence of the judiciary. Try as one might, there is just no way in which morality or prudence can be invoked to understand and appreciate these decisions or the manner in which they were arrived at and implemented.

If Chief Justice Ray acted on some manner of pressure or threat by the regime, this behaviour becomes understandable, even if not fully justifiable. But if he acted on his own, unaided and unabetted by the regime (as it ought to be in normal times) then he has a case to answer before the bar of history. The interim *ex parte* ruling must be simple and clear: if he acted on his own in these matters it was reprehensible and unbecoming to the highest judicial officer of India. But we do not have his side of the story. In the interests of modern Indian history, Justice Ray in his retirement should clarify these puzzles, lest he be judged too severely by posterity.

In any case, he lost considerable esteem and stature in the process, with the Bar, the Judiciary and many of his own colleagues in the Court. He was in no position to exercise any significant leadership role, even as early as in November 1975 when Justice Beg went on to evaluate the merits in the *Prime Minister's election* case, in language plainly derogatory of Justice J. M. L. Sinha and thereby of the entire judicial process in India. Chief Justice Ray was unable even to persuade his brother Beg to behave more judiciously at the time of considering the review petition for the expunction of the offending passages in *Indira Gandhi*.

As the turn of events would have it, two senior Justices—Mathew and Alagiriswami—retired during the emergency. Justices Shinghal and Jaswant Singh joined the Court on Nov. 6, 1975 and January 23, 1976 respectively. Justice Ray, with his not inconsiderable discretion as the Chief Justice was able to avoid conflict-prone senior Justices of the Court to join him in the hearing of stay petitions of the State against detenues who were given some parole reliefs or some improvements in

detention conditions by various High Courts. In almost all matters involving the grant of such stay, Chief Justice Ray exercised his discretion to form benches in a manner which would not involve senior justices like Justices Khanna, Chandrachud, Bhagwati, Krishna Iyer or Untwalia.

But it must be immediately said that the senior Justices themselves did not make much attempt (or so it appears) to restrain the Chief Justice or initiate a strategy of coping with what were more the routine challenges to the authority and dignity of the Court. The Court does not seem to have acquired a corporate character even during what might be termed, somewhat loosely, as a "life and death crisis". Instead of joining in a common strategy, each Justice went his own way as the ten opinions in two leading emergency decisions show. No attempt was made to constitute larger benches to hear issues vital to the residuary freedoms of the people, at a time when the Full Court found it relatively easy to be summoned at a short notice and without any foundation for its convocation.

It is not known whether the senior Justices protested against the way the Chief Justice went about forming benches or convening a Full Court or approving the transfer of High Court judges. It is clear, however, that if any protest was made, it was feeble and ineffective. Perhaps, they did not "lobby" the Chief because they felt alienated from him or they felt that their leader had neither the inclination nor the ability to lead the Court effectively out of the crisis. Fear too might have played its own role: if the Chief Justice and another senior judge were apperceived by the remaining senior Justices as being too closely allied with the regime, they might have thought that discretion is a better part of valour and that they would publicly demonstrate their own positions through separate opinions on each major decision affecting the administration and the law of the emergency. Some senior Justices found catharsis in the nascent legal aid movement; they moved around with a truly evangelical fervour to accomplish on a wider scale what they could not do for the people in the strait-jacket of emergency legislation. At least

one senior Justice spoke in public forums in a mildly disapproving manner of the way things were really going; this too was no more than a cathartic exercise.

All in all, it appears to a sympathetic observer that the Court as an institution was cribbed and crippled by the quiescent personality of the Chief Justice and of some of its senior Justices. The psychodynamic tensions, which were very great indeed, did not find an outlet in a revolt in the Court but in cathartic extra-judicial activities and pronouncements. A Chief Justice like the lamented Subba Rao, with his obstinate passion for civil liberties and deep humanism, or Justice Hidayatullah with his dignity, statesmanship and a vision of history, might have made the Court come alive as a well-knit centre for correcting the arrogance of power during the emergency. But this was not to be. Those times demanded an *indigenous* role-model; not *pale* invocations of Lord Atkin. Such a role-model was nowhere to be found in the personality of the Chief Justice as well as many others, including some senior Justices of the Court.

D. THE PRIME MINISTER'S ELECTION CASE: TO STAY OR NOT TO STAY IS THE QUESTION

The Allahabad verdict on June 12 and its immediate aftermath is now well documented in the spawning literature on the emergency. Prashant Bhushan has more specifically dealt with the legal aftermath. He suggests that Mrs. Gandhi's counsel obtained the stay order from Justice Sinha in a manner not befitting a counsel. The argument that the initial stay was not properly obtained or that it was not properly utilized was again canvassed by Shanti Bhushan in his objections to the hearings in *Indira Nehru Gandhi* v. *Raj Narain*. Justice Krishna Iyer was unable to accept the contention. We will now look at what was at stake in that petition.

A situation unparalleled in the history of Indian, and perhaps the world, judiciary thus arose. The burden of the decision fell on the vacation judge: Justice Krishna Iyer. Although he was, at that time, eighth in the seniority ranking in the

Court, and had completed a period of little less than two years on the Bench, he had already the image of being a judicial activist. Justice Krishna Iyer's political background included Ministership of Law and Justice in the 1959 Kerala Government, which experienced the full meaning of the constitutional arbitrariness embodied in Article 356. Justice Krishna Iyer himself was thus no stranger to the political significance of the case, which would have registered itself on his brother Justices at a level other than that provided only by personal involvement, howsoever brief and dramatic, with power politics. Justice Krishna Iyer is, by the same token, unable wholly to accept the "traditional methodology" of judicature "with eyes open on law and closed on society" and regrets that lack of "systemic changes and shifts" makes irrelevant "national crisis and democratic considerations" as "major inputs in the Judge's exercise of discretion" [(1975) 2 SCC 159 at 161]. But Justice Krishna Iyer is not wholly to be persuaded to sit in the "sound proof room" of the "Hall of Justice". He expresses awareness of the "historic power stakes" involved in the appeal and stay proceedings (p. 161). He takes judicial notice of the fact that in "politics 'red in tooth and claw', power lost is not necessarily regained", and although he is in broad sympathy with Palkhivala's plea that a grave injustice would be done to the petitioner if an unconditional stay is granted, Justice Krishna Iyer does not *explicitly* include this factor in applying the 'balance of convenience' test in the case.

The problem before Justice Krishna Iyer was a straightforward one: should he, following precedents, grant the appellant a conditional stay or should he, disregarding precedents, grant an absolute stay? In the former, the operation of the judgment and order of the High Court is stayed and the candidate continues to be the member of the legislature subject to restrictions on participation in the proceedings and voting and drawing remuneration. Justice Krishna Iyer found that "there has rarely been... 'absolute stay' issued by this Court in election cases where a member has been unseated by the High Court for corrupt practices" (p. 165). Since this was so, the Court was right to grant a conditional stay.

And that normally would have been the end of judicial proceedings. But, characteristically, Justice Krishna Iyer issues "a *hopefully* longer speaking order".

This "hopefully longer speaking order", history might record, spoke a bit *too* much. For, Justice Krishna Iyer not merely held that Mrs. Gandhi could remain a member of Parliament, under the conditions of non-participation and non-remuneration, but he also proceeded to hold that the "restrictions set out in the usual stay order *cannot* and *will not* detract from the appellant being entitled to exercise such rights as she has, including addressing Parliament and drawing salary in her capacity as Prime Minister". He further clarified that there will "thus be no legal embargo on her holding the office of Prime Minister". This holding, he hastens to add, has nothing to do "with extra-legal considerations". He amplifies what he means by "extra-legal considerations", in the next sentence:

> Legality is within the Court's province to pronounce upon, but canons of political propriety and democratic *dharma* are polemical issues on which judicial silence is the golden rule (p. 169).

But he himself does not feel bound by this Golden Rule: the question as to whether Mrs. Gandhi should stay as a Prime Minister or not is essentially a matter of political propriety and democratic dharma. I had myself the occasion to point this out to Mrs. Gandhi when I met her with a group of Delhi University "intellectuals" after the Allahabad verdict and before the Supreme Court order. I was persuaded to join the delegation on the explicit understanding that nothing more would be said except that she would be within her rights, and it may not be improper for her, not to resign until the Supreme Court speaks through an order. Acting on this understanding I did say just this to her, and went on to add that if the Court were to grant a conditional stay a most difficult situation would arise for her and I hoped that she would respond to it with the best standards of democratic behaviour. (To my distress some people, including the leader of the delegation, spoke of her *moral* duty *never* to resign from Prime Ministership! It was then that I realized it was a mistake to have joined the group and that, in principle, I should never join any delegation seeking to advise political leaders. It appears that in India a degree of sycophancy is accepted as necessary if intellectuals are to influence the course of political action).

Be that as it may, if legality was all there was in the province of the Krishna Iyer Court, how is it that the Justice proceeds to declare that the appellant may continue as the Prime Minister? This was not in issue in the stay proceedings and the Court was scarcely expected to elucidate the consequences of a limited stay order in so many words to parties before it. In any case, the party here had the benefit of the best legal advice on the scope of the stay order. Her legal advisers then included Nani Palkhivala, who had so persuasively led Justice Krishna Iyer, for the Court, to do his job through the ruling of the Court!

It is clear that Justice Krishna Iyer could not wholly confine himself to the "province" of legality. Nor could he convince himself, though he purported to bind himself, by 'precedents' for well over two decades, concerning the distinction between 'absolute' and 'conditional' stay. Indeed, he went on to say that there is "practically little difference" between the two kinds of stay orders when the petitioner is a Prime Minister. To press the distinction, in this context, is merely an exercise in "shadowboxing" (p. 170).

But, of course, there is in strict law a distinction between absolute and conditional stay order. Under the latter, the member cannot participate and vote nor can he draw remuneration; under the former he can presumably do both and also the rest. That is why Palkhivala was urging an absolute order. The right to address in the capacity of a Prime Minister is qualitatively quite different from the right to participate available to an ordinary member not holding any official position.

Justice Krishna Iyer was able to say that there is no difference between the two types of orders only in relation to Mrs. Gandhi's *specific* situation and not in relation to Prime Ministers

in general. This is shown by the fact that he takes judicial notice of the fact that Parliament was not in session then and therefore the restrictions in the stay order passed by the Court did not make any practical difference. He also issues directions to ensure that the Court expedite the appeals and cross-appeals in "national" interest.

In other words, although he proceeds to grant a conditional stay, in accordance with precedent, he in his own mind is offering a functional equivalent of absolute stay. One expected of a creative Judge like Justice Krishna Iyer that he would have been more forthright. If what mattered, in his assesment, was that the matter concerned the high office of the Prime Minister who, in the interest of the Nation, should always be given absolute stay, he should have *so* held. If he decided that the situation with which he was dealing was one which raised, in the abstract, questions concerning the Prime Minister being unseated by High Courts for corrupt practices, he could *not* have been bound, in strict law, by any precedents. For in the history of India, as far as one is aware, this was the first situation of its kind. It was ex hypothesi unprecedented: how then *can* the Court have precedents limiting its discretion? If, on the other hand, as sometimes appears to be the case in the judgment, what was involved is the determination of the appropriate stay in case of members of legislatures, including of Parliament, there were a large number of decisions which rightly bound him.

Logically, there were thus two starting points. But Justice Krishna Iyer fervently believes, and this also finds utterance in this opinion, that 'life is larger than law" (p. 160). Therefore, he says what we have is a case of a member of Parliament who is *also* a Prime Minister. So far so good. But does it make sense to say then that the Prime Minister gets quasi-absolute stay and that the member gets a conditional stay? The implication of the proposition that "life is larger than law" must be that in a case like this one might transcend the law if the individual judge feels it should be transcended. This, in effect, is what Justice Krishna Iyer is trying to achieve but

he dresses his thoughts *uncogently* in the language of precedents.

Apart from the crumbs thus thrown to the opponents of the regime (all that "democratic *dharma*" talk) the decision is really in favour of Mrs. Gandhi as a Prime Minister, *in her specific situation*. Perhaps, unbeknown to Justice Krishna Iyer, whose judicial integrity is beyond question, he offered advice to her which was not warranted in judicial discourse and in any case proved disastrous for the Court later on. He says, in so many words:

> After all, the High Court's finding until upset holds good, however *ultimately weak* it may prove. The nature of the invalidatory grounds, *I agree, does not involve the petitioner in any of the graver electoral vices set out in Section 123 of the Act. May be, they are venial deviations in law* but the law, *as it stands*, visits the returned candidate with the same consequence of invalidation. Supposing the candidate has transported *one* voter (emphasis in original) contrary to the legal prohibition and he has won with a huge plurality of votes his election is set aside. *Draconian laws do not cease to be law* (*sic*) *in courts but must alert a wakeful and quick-acting legislature* (p. 164, emphasis added).

Although he subsequently says, quite rightly, that it is "premature and presumptuous" for him to pronounce upon merits, Justice Krishna Iyer has, in a general way, already done so. The above passage shows three things. First, Justice Krishna Iyer is already clear in his mind that Mrs. Gandhi committed no "graver electoral vices" set out in Section 123 of the Act. Second, he feels that the law on corrupt practices is draconian and therefore leaves courts with little option, once even the most 'venial' breaches of the law are demonstrated. Third, and presumably in exercise of judicial power, which he earlier rightly suggests should be "dynamic", forward-looking and socially lucent and aware", that legislatures should be alert to what judges say. They should be "wakeful" and "quick-acting".

How is all this to be understood? Did Justice Krishna Iyer

mean, quite gratuitously, to alert Parliament to amend the election law so as to make it less Draconian? Whether or not this is what he intended, it is clear that this is how the message was actually received. The legislature was so "alert", for a change, to the sayings of a judge exercising "dynamic, forward-looking and socially lucent and aware" judicial power, that it acted with a swiftness and thoroughness to amend the law and the Constitution which Justice Krishna Iyer's "quick-acting" phrase does not quite capture. Indeed, the quickness of legislative action was the speed of light.

When the history of the tumultuous events of June 1975 is written, the Supreme Court's order will be seen to be of very great political significance. It granted, in people's minds, Mrs. Gandhi's right to continue as Prime Minister; after all, Justice Krishna Iyer had in terms ruled that there was no legal embargo "on her so doing". At the same time, it added many wrinkles to a political situation which was already dangerously complex. Justice Krishna Iyer had noted that there was "unanimous vote" in the Congress Parliamentary Party 'reaffirming faith in the petitioner as the leader and the Prime Minister' (p. 162). But the Court now holds that the leader and the Prime Minister cannot speak at will or at all vote in Lok Sabha; how long, then, could she remain supported by the "thunderous" unanimity and assertion of faith in her leadership? The complexity thus created was further aggravated by references to "political propriety" and "democratic *dharma*" in respect of which the Court endeavoured to maintain discreet silence. These very references added fuel to the fire of intense opposition to her continuance as the Prime Minister. But her supporters, at the same time, were able to quote the Court's "no embargo" phrase at their opponents.

The Court had of course no idea that its carefully manicured generalities might contribute to the proclamation of the emergency the following day, nor that such contingency plans were made in case its ruling was "adverse" to the Prime Minister. The proclamation was not as such caused by the Court's order, but the Court certainly facilitated it by shaping the

timing, contours and justification of its decision. By the same token, if the Court had granted an unconditional stay, it would have generated a different atmosphere in the Congress Party and the small advisory group to Mrs. Gandhi. Perhaps, the Court would have come under very heavy criticism by the opposition and even compared unfavourably with the Allahabad High Court's "courageous" decision. But the opposition could not have then effectively urged to continue to ask Mrs. Gandhi to resign. The drastic decisions would have been postponed, perhaps till the Supreme Court pronounced in appeals over the validity of Mrs. Gandhi's election. And perhaps the same forensic skills and talents of Nani Palkhivala would have remained available to Mrs. Gandhi, which had so persuasively "seduced" the Court in the stay petition to rule in her favour of continuing as the Prime Minister. Perhaps, an altogether different political scenario for the ruling and opposition parties would have emerged.

You may well say that all this is hindsight. But can students of the highest Court in the land not expect a minimal degree of foresight from its ablest minds? or even plain judicial hunches concerning the probable impact of the judicial decision? The Court could have taken a little more time to ponder over the situation, which was grave and unusual to justify a trivial delay of a day or two. I maintained then, all through the emergency, and maintain it even now that the Nation could have benefited greatly by some judicial venturesomeness. If this was not felt justified, the nation could have also been benefited by clarity in what the Court held. But we had (alas !) neither venturesomeness nor clarity.

This is further shown by Justice Krishna Iyer's invitation to counsel on both sides to make a motion for review since the Order which the Court issued was in this sense "provisional". The Court seems in fact to propose to Mrs. Gandhi what she should do in case she has difficulties :

> If new events like convening of Parliament may take place or fresh considerations crop up warranting the review of the restrictions in stay order,

> the petitioner-appellant will be at liberty to move a Division Bench of the Court again to modify the restrictions or pray for an unconditional stay (p. 170).

A similar concession also accorded to the respondent is quite meaningless as the respondent would not in any case seek the revision of restrictions on the stay order and would be, quite clearly, entitled to oppose a prayer for an absolute stay.

Justice Krishna Iyer could have easily reversed the strategy by granting absolute stay and giving a more meaningful concession to the respondent to move the Division Bench. That kind of decision too would have left leeway for the regime to avoid drastic actions and provided the opposition with the opportunity for a full-scale legal battle on appeal. If Justice Krishna Iyer had thought about this alternative, he would no doubt have preferred the possibility of his being overruled by his colleagues than confront the nation with the adverse consequences which might then have probably ensued. Realistically speaking, the prospects of the Division Bench overruling an absolute stay were miniscule for the lynchpin of such an order would have been that in strict law there has been no case of this kind ever before the Court and that the petitions must be disposed of by giving them the highest priority in view of the situation in the nation. Instead, Justice Krishna Iyer meted out, in form, a conditional stay hedged, in substance, with a variety of caveats reinforcing the position of the appellant.

Why did the Court do it? Authentic answers to this can only come from the memoirs of Justice Krishna Iyer in the future. But basically, all this equivocation arose because the Court wanted to decide in accordance with the law and still ensure that the institution of Prime Minister is not wholly undermined by a scrupulous regard to the knitty-gritty of legalism or in its words "the quirk of legal nicety" (p. 161). This was to be done consistent with the judical image of neutrality, which also meant that the Court should shy away from "politics". The result is that the Court speaks, Solomon-like, both to Mrs. Gandhi and the Opposition. To Mrs. Gandhi it says:

> Carry on as a Prime Minister. Our order will not hurt you much as the House is not in session. If it begins to hurt you, please come back to us and we will do our best. Incidentally, I think that you have not practised any major electoral vice. If you were alert, you would ensure that the Draconian law on corrupt practices is sensibly modified. Sorry, I cannot say much more because I am speaking from the "Hall of Justice".

To the opposition, the Court says:

> Look, we have not departed from precedents, even though we could have. We have raised the issue of 'political propriety' and 'democratic *dharma*' but we cannot say any more than this as we are speaking from the 'Hall of Justice'. It is true that we have said that Mrs. Gandhi can stay as Prime Minister. We said it because the restrictions in a stay order did not make much sense as long as Parliament was not in session. We cannot deny the right of review to the petitioner when the restrictions in stay begin to hurt her; so we have indicated that she can come to the Division Bench when that happens. We have done our duty. Matters of 'democratic *dharma*' are in your hands and hers, not ours. Incidentally please do not feel upset by the stray observations in our judgment-like 'venial' vices and Draconian laws. If you look closely, all that we are saying is that law as it stands must be enforced. This means that if a 'wakeful and quick-acting' legislature alters the law, we will enforce the law as it then stands. You must appreciate that your courts cannot possibly do anything more.

There is great merit in translating judgments of Courts in people's language. They are better understood that way. But when they are so understood, the danger arises that they will be regarded as political. This can be called 'danger' only because we think that the Supreme Court should not indulge in politics. But the plain fact is that it does. It is a centre of political power, and like all centres of political power its first concern is with its survival as such and its next concern is to augment its power. If we refuse to accept this plain fact, we cannot claim to understand the decision in this case. Whether

or not Justice Krishna Iyer self-consciously did this is another matter. But objectively, the Court cannot but be concerned with its survival and the growth of its power. And in every major case of public or national interest it must seek legitimacy. Here, the Court seeks legitimacy from both groups: the opposition and the ruling party. It gives to both something to do or, in more abstruse words, it makes "inputs in political systems".

E. THE PRIME MINISTER'S ELECTION CASE: THE STORY OF THE MISSING DISSENT

Indira Nehru Gandhi v. *Raj Narain,* [1975 Supp SCC 1] was decided in the first phase of the emergency. The war of attrition with the judiciary had just begun. The Thirty-ninth Amendment, as we all know, through clause four to six of Article 329A does five things. First, it says no law made by Parliament as regards all election petitions "shall apply or shall be deemed ever to have applied" to or in relation to "the election of the Prime Minister or the Speaker". Second, such election "shall not be deemed to be void or ever to have become void" on the grounds of pre-existing election law, even if it is declared to have been void. Third, such election shall continue to be valid in all respects, even despite any "order made by any court". Fourth, any judicial finding invalidating such election "shall be and shall be deemed always" to "have been void and of no effect". Fifth, clause (5) of Article 329A relates to any appeal or cross appeal pending before the Supreme Court at the time of the amendment and directs that it shall be "disposed of" in conformity with -clause (4). Clause (6) declares that "the provisions of this article shall have effect notwithstanding anything contained in this Constitution".

In *Indira Gandhi* the Supreme Court considered the validity of this amendment in the light of the "theory" of the basic structure developed in *Kesavananda Bharati,* which it regarded as binding upon the Court, upon acquiescence by counsel on both sides. It is well known that with the exception of Justice Khanna, none of the other Justices (Chief Justice Ray, Justices

Mathew, Beg and Chandrachud) subscribed to the "theory" of the basic structure in *Kesavananda.* Each of the Justices, however, proceeded to deal with the validity of clause (4) of Article 329A individually. The amendment is held clearly invalid by three Justices (Justices Khanna, Mathew and Chandrachud). Chief Justice Ray discovers "infirmities" in the impugned clause; but in substance he too holds the amendment to be invalid. Justice Beg does not strike down clause (4) but construes it as not ousting judicial review on the merits of the appeal and cross-appeal under the unamended Representation of the People Act, 1951.

Justice Khanna invalidates the clause on the ground that it violates the basic structure of the Constitution by violating the "democratic set-up" and the "rule of law". Justice Chandrachud strikes the clause down as violative of the basic structure in these respects as "an outright negation of the right to equality", and as "arbitrary, and calculated to damage or destroy the rule of law". Neither Justice Khanna nor Justice Chandrachud employ the notion of "constituent power" as the basis of their reasoning. I have analyzed in detail the notice of constituent power in my lecture to the Bangalore Bar Association in 1976 (now published in ILI, 1978: 122-43). I do not think it necessary here to canvass the same themes. But I do want to stress that Justices Khanna, Mathew and Chandrachud categorically invalidated the above amendment as violative of the basic structure of the Constitution. Chief Justice Ray also invalidates the amendment but this he does with less openness. Justice Beg instead of invalidating the amendment proceeds simply to amend the amendment! This he does in the face of Article 329A which in a most clear-cut manner bars judicial review of petition on merits. He finds himself able to say that the relevant clause does not do so, whereas it does! Hence, Justice Beg too demonstrates my thesis, which I have been urging for well over a decade, that the Court not merely legislates but is possessed of a constituent power, which it shares with Parliament. Justice Beg's demonstration provides yet another example.

Justice Khanna struck down clause (4) of Article 329A on

the ground that it violates the feature of 'democracy' held to be an aspect of the inviolable basic structure of the Constitution. He held that democracy requires that elections be "free and fair" and that "they are instruments of ascertaining popular will both in reality and form" and are *not* "mere rituals calculated to generate illusion of deference to mass opinion" (p. 87). But he operationalized the idea of free and fair elections only with reference to one indicator: that is elections would not be free and fair "unless there is a machinery for resolving an election dispute" to examine the allegation that there were malpractices. Such machinery should be necessarily backed by legal sanctions (p. 88). Judged from this standard, Article 329A (4) failed. It not merely divested courts of their competence to examine election disputes but also failed to provide a forum for adjudication of such disputes. What was more striking, said Justice Khanna, was the fact that without doing this "the constituent authority has declared the election of the appellant to be valid" (p. 89).

Justice Khanna was clear that to confer such validity, regardless of allegations of "gross ... improprieties" or flagrant ... malpractices", and of "foul" means "violative of the principles of free elections", was impermissible. It was all the more so in the case of the Prime Minister or the Speaker of the Lok Sabha because "both these offices represent the acme of democratic process in the country" (p. 89). Article 329A (4) was thus held to strike at the very "basis of free and fair elections" (p. 91).

It is interesting that no other Justice based his invalidation as strongly and firmly on the principle of free and fair elections, as an aspect of democracy in the "basic structure". Justices Ray, and Mathew proceed on the basis that Article 329A (4) was bad because constituent power cannot be employed to exercise judicial power. Justice Chandrachud relies on equality and the rule of law as features of basic structure. Justice Chandrachud at least explicitly faced up the argument adopted by Justice Khanna. While he held that the "contention that 'democracy' is an essential feature of the Constitution is

unassailable" (p. 254), he found himself unable to agree that Article 329A (4) struck at the root of the democratic structure. Justice Chandrachud said that 'democracy' was a coat of many colours. Principle of free and fair elections, he said, is only one aspect of the democratic process. The electoral process, he said, was not 'abrogated'. The right to adult suffrage in Article 326 stood unimpaired; Articles 80, 81, 85, 100(i) and 105, and its counterparts for state legislatures, still remained unaffected. Therefore, he found it impossible to hold that "the impugned provisions destroy the democratic structure of our government" (p. 256).

Indeed, and let us remember that he was speaking in the very first phase of the emergency, Justice Chandrachud says that the fact that all the foregoing provisions are "unimpaired" by the Thirty-ninth Amendment constitutes "enough assurance that Parliament is not leading to a totalitarian path". Justice Chandrachud is led by his concern to say that he is not "putting a seal of approval on immunity conferred on any election" (indeed he does not through the equality and rule of law arguments, which he uses to put the seal of *disapproval*). Rather, he is concerned not to generalize from such a single act that it has "destroyed or threatens to destroy the democratic framework of our Government". He puts this thought strikingly well:

> One swallow does not make a summer. The swallow with its pointed wings, forked tail, a curving flight and twittering cry is undoubtedly a harbinger of summer but to see all these in the Thirty-ninth Amendment and to argue that the summer of totalitarian rule is knocking at the threshold is to take an unduly alarmist role of the political scene as painted by the amendment. Very often, as said by Sir Frederick Pollock, "If there is any real danger it is of the alarmist's own making" (p. 256).

Although each Justice was free to choose his own path to invalidation of Article 329A (4), and although this itself signified an act of moral and political courage at that time, Justice Chandrachud's foregoing observations are astonishing at the level of statesmanship and disconcerting at the level of

juristic technique. At the first level, surely the Thirty-ninth (and its sister, the Thirty-eighth) amendments were by no means a single swallow but rather a swarm of these. It is rather pointless to list the many features of these amendments here but one may refer to the expansion of the Ninth Schedule so as to embrace the MISA and even the Representation of the People Act. The manner in which press censorship and detention legislation worked were matters of wide knowledge and could not have been unknown to the Court. To say, in this context, that one cannot infer the "summer of totalitarian rule" from these amendments and to dismiss the perception that democracy is in danger (even in the words of Sir Frederick Pollock) as of "alarmist's own making" is a bit too smug. What is worse, it gives the impression that the regime is being given a "good chit" which it perhaps did not ask for and certainly had not done much to deserve or even expect. One might regard Justice Chandrachud's statement as prefatory to his own invalidation of the amendment. Indeed, this appears to be his intention. The observation was merely, one might say, an attempt to sugar-coat the pill of invalidation. But then the pill was sugar-coated in any case. At any rate, it was not bitter for the regime as all the retrospective amendments to the election law were, after all, upheld by the entire Court. As a practical matter, the regime was not much concerned with the limits of its constituent power; it was, at a pinch, more important for it to retain its wide legislative powers.

At the level of juristic technique, Justice Chandrachud's conception of what constitutes 'democracy' as an aspect of the basic structure is somewhat disconcerting. Of course, he is entirely right to emphasize Max Radin's advice to be humble when we come to defining concepts like 'democracy', whose meanings are not invariant (p. 255). But the question is when can we say that a component of the basic structure (here, democracy) is violated? There is general agreement that free and fair elections are one component, adult suffrage is another and provisions dealing with the power, voting procedures and privileges of legislatures provide yet another component. Justice Khanna clearly holds that if the component of free and fair elections is violated, the basic structure limitation comes into immediate operation. Justice Chandrachud says, "Not so." From his recital of various provisions bearing on the democratic structure of the Indian Constitution, it appears that the violation of the basic structure will occur only when there is some fundamental alteration in the totality of the components of 'democracy' or in each and every one of them. But does this mean that if only adult suffrage was abrogated and limited franchise was introduced the limitation of the basic structure on the constituent power will not be operative? or is it meant that not all components or aspects of 'democracy' are equally basic and that some may be sacrificed? The problems thus raised, and there are others, are not inherent in the notion of the basic structure but are peculiar to the manner in which the notion is approached or handled.

Indeed, it would have been far better if Justice Chandrachud had altogether by-passed the contention based on 'democracy' since he adopted the doctrine of 'equality' and 'rule of law' to invalidate Article 329A (4). But since he did deal with the contention one could not help wishing that he should have applied his juristic talent and superb craftsmanship to further clarify his own thinking on this vital aspect. He would be the first to agree that the notion of basic structure, still in its formative era, remains too vulnerable to bear occasional tinkering, whether by judges or jurists or politicians. We must therefore regard his excursus into the notion of basic structure (democracy) as a mere casual obiter and not as his well-considered opinion or as a fuller response to Justice Khanna's analysis. In technical parlance, his observations should have the status of casual dicta.

And yet it remains significant that out of the five Justices, only Justice Khanna should have adopted free and fair elections as his major premise for the invalidation of the amendment. Why did the other Justices refrain from following this lead? Was it because they foresaw some basic difficulties in this approach? or was it due to their perception, apprehension or fear that such an approach might lead them into a 'political

thicket'? We shall not know the final answers for quite some time, if at all, whether the latter factor predominated. But we have some evidence of the difficulties which beset Justice Khanna in altogether sustaining his major premise.

The difficulties stem from the fact that once the premise of fair and free elections is used to invalidate the amendment, the validity of the retroactive changes in the electoral law could scarcely be adjudged by other standards. Justice Khanna could have avoided the difficulties thus arising by the simple expedient of asserting, as other Justices did, that the basic structure limitations apply only to constituent power but not to ordinary legislation. He chose not to do so. This may have been because it appeared odd to him that while the principle of free and fair elections could be employed against a constitutional amendment, it should have no application at all to a law made under the Constitution. It is certainly difficult to understand, at a commonsense level, why the basic structure limitations operating on the higher (constituent) power may not operate upon lesser (legislative) power. But for Justice Khanna to hold that the basic structure limitations should operate all round, for constituent as well as legislative powers, would have involved too broad and too novel a proposition. Six justices in *Kesavananda* did hold that the validity of that part of the Twenty-ninth Amendment which inserted certain statutes should be examined by the Constitution Bench with a view to find out whether they offended against any part of the basic structure doctrine. Justice Khanna at that time had reserved his opinion on this matter. In any case, as Justice Mathew points out in *Indira Gandhi,* the observations of the six justices in *Kesavananda* really pertained to the amendment and not to ordinary laws. Whether or not this was the correct position, *Kesavananda*, strictly, did not involve the issue of the application of the basic structure limitations to any ordinary legislation. This then meant that Justice Khanna had to chart out a new course in *Indira Gandhi* if he wanted to extend the basic structure limitations to the retroactive amendments to election law. But in this venture he did not expect, and could not have got, the support of the

brethren for the very simple reason that on their own respective major premises for invalidating Article 329A (4) they were not faced with any of the "odd" problems which confronted Justice Khanna.

Justice Khanna, having adopted the major premise that he did, had logically only two options. One was to file a dissent, by extending the basic structure doctrine to the retroactive amendments to the election law. The other was to say that the basic structure limitation cannot apply to such laws. But this latter position, as pointed out a little earlier, sits strangely with his own premise that fair and free elections constitute an aspect of the basic structure of the Indian Constitution which Parliament just cannot amend. So, he finds the way by rejecting both these alternatives: the result is even more striking. He has to hold that in no sense can the 1975 electoral law amendments be said to vitiate the principle and process of free and fair elections!

The puzzle is why Justice Khanna did not dissent, as he should have logically done since he applied the free and fair election standard to adjudge the validity of the amendment and since he refused to extend the notion of basic structure limitation to adjudge the validity of the retroactive election law amendment. Had he dissented, the majority outcome would still have been the same; so that legally his dissent would have made no difference. But perhaps a dissent on these lines by a senior Justice might have struck a moral blow on the legitimacy of the regime. It would no longer then have been possible to project the image that "Indira Gandhi won her election appeal against Raj Narain by a unanimous verdict of the Court". Most citizens, the media and even quite a few lawyers felt then that this was exactly what had happened. They did not or did not want to grasp the symbolic significance of the fact that the Court had invalidated a constitutional amendment. People simply asked then: "So what?". A divided Court on this issue, however, would have weakened this image, and helped sharpen public consciousness (despite the censorship) concerning both the legality and legitimacy of the regime.

But by the same token even a powerful solitary dissent would have brought forth indignation and even intimidation from the regime. As we will see later, even the relatively innocuous (in the immediate political sense) invalidation of the amendment brought in its wake the anonymous, but clearly regime-supported, proposal for the creation of a new constitutional court appointed by the President, divesting the Supreme Court of its vital jurisdiction and powers. The need of the hour in November 1975, might have been summed up in the phrase "Save the Court Now".

And there is enough internal evidence in the five opinions to support the view that the Court was concerned with the survival of its powers. This is the reason why the theme that the constituent power cannot perform judicial functions is so pre-eminent in the three opinions. But even aside from this, it is clear that the Court was on the defensive. It worked out a masterly strategy of accommodation, so that neither the regime nor the opposition could say that the Court failed them. Even a solitary dissent, on the lines imminent but not actualized in Justice Khanna's concurring opinion would have destroyed this very delicately structured compromise.

The essence of this statesmanlike compromise could be summed up in one sentence: "The Court has to decide the matter in accordance with the settled law". If the majority of Justices in *Kesvananda* had held that the amendatory/constituent power was subject to certain "implied limitations", how can the Court depart now from the binding 'precedent'? Mrs. Gandhi and her supporters could scarcely publicly cavil at this position, since in the supersession controversy one major criticism of the Court was precisely this: that the Court did not impart certainty to its propositions concerning the amendatory and constituent powers and changed its opinions too readily and without adequate justification! Nor could they really complain about the Court following its precedents because that approach paid off for them in the Court's upholding of retroactively amended election law whose validity was crucial to the legitimacy of the regime. On the other hand, the Court was able to signal to the opposition that the majority of judges in this case who in *Kesavananda* were

unwilling to subscribe to the basic structure were not merely willing *now* to do so in the title of judicial self-discipline but were also quite able to use that notion in fairly liberal and flexible ways. Lest this message go across *too* sharply, the Court again modulated it by saying, by a majority, that it was not going to risk the extension of the basic structure limitation to adjudge the validity of ordinary laws. In other words, the gold medal was not awarded to either side. But Mrs. Gandhi and her supporters did get the silver medal and her opponents the consolation prize in the shape of the invalidation of Article 329A (4).

In this entire process the Court projected successfully the image that it was deciding "according to the law". It carefully muted the fact that the law guiding their decision was, in fact, the law that the Court itself had made. For example, *Kesavananda* could not have in terms held that the doctrine of basic structure cannot be applied to statutes for the simple reason that no statute was challenged there on that ground: the Court there was only dealing with the validity of the constitutional amendments. Similarly, the doctrine that there are virtually no limits, save those placed by the fundamental rights, to the extent of retroactive legislation in electoral law was also the result of its own interpretations of the nature of legislative power, evolved in contexts not really strictly applicable to the case at hand.

One can now better understand why, if he in the first place ever thought of it, Justice Khanna decided against filing a solitary dissent. This would have completely disrupted the statesmanlike compromise evolved in the interests of institutional survival by the Court. Disruption of this compromise or accommodation with the regime would in any event be without any loss of legality to the regime. The impulse to dissent might have yielded to wise second thoughts concerning the need to save the Court. Justice Khanna might have felt that there would be occasions for dissent in future, when he could also carry his colleagues with him. The occasion arose in the *Habeas Corpus* case in the second phase of the emergency. Justice Khanna projected his dissent then, as a voice of political opposition. But no other colleague joined him. Little did he, or

indeed anyone, know on November 7, 1975 (the date of *Indira Gandhi* decision) that in a few more month's time it would already be *too late to dissent*. Many felt in November 1975, that Mrs. Gandhi's confidence in democratic processes would be nurtured back by many factors, including the Court's decision in her favour; many thought and felt that the imposition of the emergency was a passing phase, an aberration in the political system. But by May 1976, there were already substantial indications that the emergency was going to endure indefinitely.

It was the confusion of the times and the inability of the judicial mind to forsee national political trends which, more than anything else, contributed to the ultimate unanimity in the *Indira Gandhi* decision. This also led Justice Khanna to defer his dissent to another time and in another context; he abandoned the inner logic of his own opinion and proceeded to hold, with much strain, that the retroactive amendments to the electoral law really did not interfere with the process and principles of free and fair elections. Let us follow briefly the agonizing path with him, even as we conclude the analysis of this case.

F. RETROACTIVITY AND FREE AND FAIR ELECTIONS

Shanti Bhushan's main argument was that Act 40 of 1975, which retroactively changed election law, was invalid as it offended against equality norms of the basic structure of the Constitution. He argued that what had happend as a result of changes was that the basic rules of electoral contest were retrospectively changed. If such changes in the very rules of the contest were held valid it was conceivable and likely that "the party in power could manipulate laws in such a way as to always stay in power". For example, he said, retrospective changes could be made by relaxation of certain rules favouring the incumbents. And, as a matter of strict logical possibility, he argued, the power to relax rules in this manner can also be used to retrospectively make the rules *stricter*. He specifically objected to retroactive rules changing the definition or operative meaning of "corrupt electoral practices", which created a situation fundamentally unfair in relation to the defeated

candidates. Bhushan also argued that Act 40 of 1975 was a "colourable piece of legislation" since out of the seven charges of corrupt practice as many as five were resolved in favour of Mrs. Gandhi. He argued:

> After seeing the timing of this Act, there could be no doubt that this whole Act is meant just for Mrs. Gandhi's election. It is only concerned with revalidating one single election. It is a legislative plan to secure a particular result in a particular case and in *Liyanage* case (1967 (1) A C 259) it has been clearly held that such a plan is impermissible (Prashant Bhushan, 1978: 194).

Justice Khanna dealt with this last contention quite adroitly. He found it inconceivable to say that there was such a "legislative plan" because Article 329A(4) specifically provided, through clause (*iii*) that the election of the appellant shall continue to be valid in all respects and clause (*i*) expressly stated that the Representation of the People Act shall not apply to election petitions and related matters pertaining to the election of the Prime Minister and the Speaker. If no law were to apply to the appellant's election dispute, and if it was to be deemed valid, how, asks Justice Khanna, can we "accede to the argument that the constituent authority kept in view" the provisions of Act 40 of 1975? (p. 87).

As a matter of strict law, Justice Khanna is quite correct in his conclusion. There was no way in law by which a Justice could draw the inference that counsel urged him to draw. "No way" puts the matter strongly because there is always the doctrine of judicial notice. The plain fact was that the amending bill was introduced on August 4, 1975 and was passed by Parliament on August 5, 1975. The Thirty-ninth (Constitution) Amendment Bill was introduced on August 7, 1975 and was passed by Parliament and ratified by seventeen State legislatures by August 9, 1975! A perusal of relevant debates might show that the constituent body may have been well aware of the changes in electoral law. But it chose not to betray its cognition on the face of Article 329A(4). In the circumstances, if Justice Khanna had taken notice of the above fact relating to the

passage of the bills, a question might have been raised as to whether the Court was taking judicial or political notice of certain facts.

In any event, the invalidation of Article 329A(4) raised its own logical embarrassment for Justice Khanna. What now remained was the bare position of Act 40 of 1975. If there was no constitutional provision any more, Bhushan's argument that Act 40 was a "legislative plan" stands out equally sharply and had to be met. In *Liyanage* v. *Queen,* upon which Bhushan relied, the Privy Council found that the "true nature and purpose" of the impugned enactments was revealed

> *by their conjoint impact on the specific proceedings in respect of which they were designed, and they take their colour, in particular, from the alterations they purported to make as their ultimate objective,* the punishment of those convicted. These alterations constituted a grave and deliberate incursion into the judicial sphere. *Quite bluntly, their aim was to ensure that judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences* (p. 290, emphasis added).

These observations are, *mutatis mutandis,* hauntingly relevant to *Indira Gandhi.* But Justice Khanna completely ignores them. There is not one word to suggest that counsel ever made this specific argument. But we know that he did. Surely, Justice Khanna, had he so desired, could have disposed of this argument by the standard technique of distinguishing *Liyanage* on facts (which were, at one level of generalization, different) or by saying that that decision does not constitute any binding precedent for the Court. Or he could have grappled with the contention by wise application of his juristic talent by holding that the Court was here not really deprived of its "normal discretion" to decide but that these particular alterations in the election law did not constitute any "grave and deliberate incursion into the judicial sphere". This is what he ultimately seems to rule in a more generalized response to counsel's overall argument. That is understandable because *Liyanage,* and the

contention squarely based on it, was pure dynamite. Justice Khanna passed the other way lest even a tremulous judicial footfall into the *Liyanage* lane might detonate it!

There thus remained the argument against retrospectivity of the changes in election law. The contention here was not merely against retroactive changes to election law during the pendency of proceedings but more basically against such changes which altered the rules of electoral contest, particularly those bearing on the definitions of "corrupt practices". Justice Khanna meets only the general challenge by saying that many decisions of the Court, including *Kanta Kathuria* v. *Manak Chand Sharma* [(1969) 3 SCC 268], were binding upon him (p 102-03). He holds that there is no bar against retroactive legislation, apart from such bar imposed by part III of the Constitution. Justice Khanna disposes the plea that amendments to electoral law cannot be made during the pendency of the proceedings by saying that this is "essentially a matter (of propriety) for the legislature to decide" and it does not "affect the competence ... to make a change in election law with retrospective effect" (p. 103, 105).

But *Kanta Kathuria* involved only a situation of removal of disqualification (in terms of office of profit: in any case three Justices did not regard the office as an office of profit). In fact, Justice Khanna had asked Shanti Bhushan, in hearings, concerning the relevance of *Kanta Kathuria.* Shanti Bhushan submitted that on facts the situation in *Indira Gandhi* was "completely different" as it related not to qualification but to *rules* of contest, affecting a change in the notion of what was permitted and proscribed in election campaign (P. Bhushan, 1978: 193-4). Nor does the invocation of Lord Darling's opinion in *Areyesekera* v. *Jayalilake* (1932 A. C. 260) by Justice Khanna have any relevance to *this* contention. Interestingly, while Justice Khanna specifically referred to Shanti Bhushan's contention that retrospective *creation* of a corrupt practice may also arise (and he reserved his opinion on this, as this was not germane), he does not refer to its converse—the retroactive disappearance or *abolition* of a corrupt practice

in the pendency of proceedings—as being at all problematic; *This* was certainly germane to the case before him.

Thus it is that Justice Khanna negatives the argument that "retrospective provisions of Act 40 of 1975 affects free and fair elections". The only cogent-looking justification for this holding is that the provisions of the law are "general in terms and would apply to all election disputes which may be pending" before courts (p. 104). But the fact that provisions are general meets only the contention (and that too only partly under the circumstances of that case) that the legislation was designed to meet the exigencies of one election — that of the appellant. It furnishes no argument favouring retrospectivity of changes in the *rules* of electoral contest. The Court really ought to rethink its position on retroactivity of legislative power, even if it holds fast to the *dogma* that the abuse of power cannot be the ground of denial of that power to an authority. As Justice Khanna himself observed during the hearing of the case "all retroactive legislation is repressive legislation". Even if the word 'all' may put the matter too sharply, the Court has to draw lines between permissible and prohibited, non-repressive and repressive, uses of retroactivity if the rule of law is really ever going to strike its roots deep in this country.

G. KESAVANANDA IN THE "AIR": SELF-CREATED JUDICIAL VICISSITUDES

Under the leadership of Chief Justice Ray, the Supreme Court endeavoured to match the expedition with which Parliament had amended the election law and the Constitution. This was done by the announcement that a Full Court would be convened to re-examine *Kesavananda* sometime after the hearings in *Indira Gandhi* were completed (after October 9, 1975) but before the decision in that case was announced (November 7, 1975). It was a truly extraordinary occurrence replete with puzzles and improprieties.

It is clear that the real purpose of the review exercise was if possible to overrule and if not, to "clarify" *Kesavananda* by trimming the size of the basic structure doctrine. The offensive

against the doctrine was not at all badly timed. The senior justices on the Court were all, aside from Justice Khanna, dissentient Justices in *Kesavananda*. These Justices had applied the doctrine of the basic structure in *Indira Gandhi*, partly as a response to the need for institutional survival and partly as a matter of judicial self-discipline. There was really no change of heart, as is evident from the fact that no dissentient justice in *Kesavananda* explicitly repudiated his earlier position in *Indira Gandhi*. Two senior justices — Justices Ray and Beg — equivocated on the extension of the basic structure limitation to *Indira Gandhi*; Justices Mathew and Chandrachud did show general signs of discomfort at having to handle so abstract a set of limitations on the sway of constituent power. Clearly, the Chief might have reckoned on the support of four senior justices (including himself).

This itself, the Chief might have thought, might induce some of the other justices to join in the enterprise. After all, Justices Shinghal and Murtaza Fazal Ali had been recently elevated (on November 6 and April 2, 1975 respectively). This gave the Chief Justice a possible tally of six votes. He might have alse reckoned that out of three other justices — Sarkaria, Goswami and Gupta — he could at least get one or possibly two votes, even if three justices (Bhagwati, Krishna Iyer and Untwalia) might not vote for containing the basic structure. The Chief might have been unsure as to which way Justice Khanna might really go; at the same time, it was reasonable to assume that if two sets of equally opposed opinions emerged, Justice Khanna might yet repeat his *Kesavananda* role, somehow "balancing" the opinions to produce a result. In any case, there was no harm hoping that somehow the basic structure doctrine could be laid to rest. If it could not be buried or grievously impaired at this juncture, it never would be in future. What then was the harm in trying?

Not merely was the Bench "right" but the time was also right. If fear stalked the streets, it also stalked the bar rooms and the corridors of the Court. But the fear stalking the corridors of court or in judges' chambers was as yet not a personal fear of detention or molestation; unlike High Court justices the Supreme

Court justices were under no apprehension of transfer. Detention or impeachment were devices having, at any rate, very high legitimacy costs for the regime. But the lurking fear was clearly institutional: for the survival of the Court as an institution as known to the Constitution. Senior justices had agreed in *Indira Gandhi* to tread warily in matters likely to affect the regime seriously. The Chief Justice of India might have felt, in all honesty, that he would be able to persuade reluctant justices to go along with him in the interests of institutional survival yet again in the hope that when normal times returned there would be no bar for revival of some form of basic limitations on constituent power.

It is clear that the decision to convene a Full Court was not just an erratic exercise of power by Chief Justice Ray; rather, it was an exercise in leadership at a crucial political juncture. Plenty of careful "homework" went into this decision. Apart from the possible voting patterns, the Chief Justice may also have expected some support from the Bar. After all, the original petitions in *Kesavananda* were still before the Constitution Bench. It was natural to assume that counsel for the petitioner may wish to seek a clarification as to whether the right to property was an aspect of the basic structure. Certainly, the Chief Justice expected that Advocate Generals of States would support the review. To be sure, opinions of Justices Khanna and Mathew, and to some extent even Chandrachud and Beg in *Indira Gandhi* had raised some difficulties with the basic structure doctrine and the Bar would, he reasonably hoped, not be too averse to an exercise in clarification.

Furthermore, it might have been felt that the Bar too had a stake in the continued survival of the Court, for when all is said and done by way of rhetoric about the rule of law and democracy, the survival of the court ultimately entails serious material interests of the livelihood of lawyers in general and appellate lawyers as a class in particular. In any case, arguments will be restrained for the fear that any political references in the course of rehearing *Kesavananda* may jeopardize

the freedom of concerned counsel. In fact, even Nani Palkhivala testified to the fear:

> If I say anything about the recent amendments in public I shall be probably arrested. In fact, the only place where there is freedom of speech in this country is the few hundred square feet of various courtrooms (P. Bhusan, 1978: 263).

But surely not all counsel could be expected to speak their minds even in the courtroom. So that while preliminary objections could be expected, vehemence in pressing them was not to be easily foreseen.

Unfortunately for the Chief Justice, the calculations as regards the Bar's interest in review did not really work well. Counsel refused to take the big and even whale-sized hints from the Chief Justice as to why the Court should review *Kesavananda* at this stage: and the Chief Justice could not really be any more explicit as to the real reasons for the review. Justice Ray had to keep saying that the Attorney General had sought a review and that the Bar itself had done so a number of times. But one by one, and to the acute embarrassment of the Court, Counsel hopefully named by the Chief Justice rose to decline the honour of having made any request for review. It finally turned out that some kind of oral request had been made by the Attorney General at some point of hearings in *Indira Gandhi*. Even that request was oral, providing a rather flimsy ground for convening Full Court.

Other justices endeavoured to come to the rescue of a deeply embarrassed Chief Justice. Justice Beg intervened to say: "You see, I do not know what the basic features are". When Palkhivala replied that it was inconceivable that the Supreme Court could not understand its own judgment (and asked, rhetorically, that if the Court could not do so, who else could?), Justice Beg replied that his real difficulty was that every provision in the Constitution appeared basic. Palkhivala was quick to reply: "If you take that view, My Lord, I will be the happiest man, because then the Constitution will remain substantially unchanged throughout."

Things were indeed not going well for Justice Beg: so he made a last valiant effort. "No, I mean" he said "that I cannot tell the difference between basic and non-basic features". Counsel replied by saying that if there was a hypothetical amendment stating that amending power is subject to basic structure, could the Court in that event be heard to say that it cannot understand the Constitution? (Id. 260)

Palkhivala argued that *Kesavananda* holding was res judicata as far as the petitions before the Constitution Bench were concerned. But if the Court reinterpreted *Kesavananda* now, the Constitution Bench would be put to an awkward choice of applying res judicata when the decision had acquired a different meaning through its review. Either way, the Court would be in unique difficulties. Hence, he urged, it was improper, and gravely so, for the Court even to attempt a modest review.

Of course, counsel said in response to Justice Untwalia's query, that the Court had the power to review decisions which were baneful to public interest or when they were marked by manifest error. But, he went on to add whether a case heard for five months and by thirteen judges, and producing decisions relying on "literally thousands of authorities" can easily attract the charge of manifest error. As to the charge of baneful impact, when the Attorney General tried to point out that the decision had caused uncertainty in the minds of Parliament, Justice Untwalia asked him to give an illustration in support of his statement. When the Attorney General cited the Thirty-Ninth Amendment Justice Untwalia pointedly observed: "No, I was talking about constitutional amendments in the public interest" (which may have been invalidated by the Court after *Kesavananda*.)

The hearings showed that the justices were themselves not very clear as regards the objectives of the review. Justice Beg tried to clarify that the review was not aimed at overruling *Kesavananda* at all: Justice Fazal Ali thought that all that was involved was to attain some removal of ambiguities surrounding the basic structure doctrine. When Justice Krishna Iyer asked the Attorney General whether he wanted a clarification or "annihilation" of the basic structure, he hedged. But it was quite clear what the Government wanted.

The argument of fear was now more than an argument. The Fortieth Amendment providing lifelong immunity to Governors and Prime Ministers for all acts done while in office had already been passed by the Lok Sabha. Palkhivala argued, with reference to the amendment, that it should no longer be possible to give legitimation to such exercises of amending power. If the Government is "ruthless enough" he said "it can abrogate the Constitution". But "let not people be fooled into believing that everything that is being done is constitutional". Even at this point of argument, Justice Beg could not resist the observation: "Do you remember that famous U. S. Supreme Court decision which led to civil war? Do you want us to be party to such a decision?" (p. 262). This was the clearest indication of fear on the Court.

Justices were afraid that something drastic might happen either way. If the basic structure doctrine stood unimpaired, ways might be found to abrogate it specially after the splendid assertion of it in *Indira Gandhi*. If the doctrine stood unimpaired, the Court may again and again be involved, one way or the other in its application to the emergency exercises of the amending power. There was no knowing where all this would lead. If only some more time could be bought, things might be less difficult all round. After all, hearing of *Kesavananda* took sixty-five days. Its application in *Indira Gandhi* took thirty-five days. A slow-motion review exercise looked like a good solvent of the unusual problems confronting the Court. Perhaps, the process of constitutional amendment can also be halted or deflected from any drastic directions in the meantime.

In looking for time as a solvent of its problems, the Court was behaving no differently from other dominant institutions of Indian society during the early phases of the emergency. Apart from justices who wished the demise of the doctrine, many other justices might have found it prudent to buy some more time in the hope that things might at least change for the better before they change for the worse.

The difficulty was that the senior counsel refused to play ball. They feared that under the leadership of Ray, the Court might even overrule *Kesavananda*. If that happened, a more repressive state of affairs might ensue. The Court was afraid that if some time was not bought at this stage by a slow-motion review, strange things might happen to the Court and the Constitution. The Bar, on the other hand, felt that the review might be a pallbearer of the basic structure. And this might not merely, in the then forseeable future, threaten the rule of law values (as they saw them) but also the *material interests* of the appellate legal profession. *Thus, true to the situation of the emergency, no one elite group trusted the other to serve its own interests.* One could better understand through some such process the fact that even the Attorney General did not perfect any worthwhile strategies of argument and virtually yielded to the objections raised by his eminent colleagues — Palkhivala and Tarkunde — at the Bar.

The result was that the next day, Chief Justice Ray had to announce: "This bench is dissolved. For two days the arguments have gone in the air". Pointedly referring to the Andhra Pradesh petition regarding service matters, he directed the Constitution Bench to refer the matter to the Full Court if there were any difficulties in unravelling the *Kesavananda* doctrine. This last was more in the nature of a face-saving device. But even that did not help. The Andhra case was to be later dismissed as withdrawn.

H. THE "UNEXPECTED" AND UNACCEPTABLE: A SLUR ON THE SUPREME COURT

The basic structure review was not the only sequel to *Indira Gandhi*. It was followed by an application for review of that part of Justice Beg's opinion which dealt extensively with the merits of the case. The gist of the review petition was that at the direction of the Court, the merits of the matter were not argued and the correctness of the findings of the High Court were not to be dealt with unless the decision on questions of law, when settled, so required it. Counsel for respondent urged this in the review application on the ground that the principles

of natural justice were violated by the Court. Moreover, it was averred that there were, because of lack of proper hearing, "palpable errors in the various observations made" in Justice Beg's opinion. Justice Beg, in the hearings on the review petition, suggested that the matter could be rectified, if considered necessary, by counsel submitting "written submissions now". When counsel insisted on oral arguments as well, the Chief Justice summarily dismissed the plea by saying "no, we cannot go into it now" (P. Bhusan, 1978 : 271).

The very next day, on December 19, 1975, the Court ruled that:

> In view of the fact that *one of us* is of the opinion that there is no sufficient ground for reviewing the judgment, this review application is dismissed. [(1976) 3 SCC 321 at 326] (emphasis added)

Justice Beg delivered an opinion of fourteen paragraphs. The opinion has to be read, word by word, to understand the enormity of impropriety that even a senior justice of the Supreme Court of India, later to adorn its Chief Justiceship, could commit. Justice Beg, in effect, disassociated himself from the observations of his brother Justices during the hearing of the main petitions. He maintained that he had made it clear all along that he was not disinclined to go into the merits, despite the fact that he acknowledged that the Chief Justice had (*or might have*) given counsel to understand that any arguments on merits were unnecessary (p. 324). He then went on to attack the motives of counsel. He found it strange that while counsel accepted the common points of all five opinions, his opinion alone should be singled out for review, overlooking entirely the fact that no other justice had examined the merits of the case at all. In words which belonged more to public meeting than the court room he warned:

> If this is a part of a political game, I think it is high time that it was realized by every one that courts are not meant for political tactics or propaganda. Those who know what tactics were adopted by some people to defeat the course of justice in this Court in this particular case will not

be mistaken if they hold the view that if this Court has erred at all in dealing with these methods, it has done so on the side of leniency. I will not say anything more about the unsavoury aspect of the case here (p. 325).

Justice Beg takes the occasion to castigate some people's behaviour in these strong terms and then suddenly decides not to say any more about it after having said actually more than enough by way of strong condemnation. If the Court erred on the side of leniency, it need not have; but if did, it was not for the Court to revisit its own generosity in rather uncharitable words. In any case, aside from Justice Beg (and presumably his colleagues on the Bench and the Bar in that case) only God Almighty shares the secret of what happened in the main hearings to invoke the wrath of the noble Justice.

Even assuming that some overt political propoganda was involved in the forensic rhetoric, is there any justification for denying to counsel the privilege which Justice Beg so vociferously exercised a little later in the *habeas corpus* case when he, in effect justified the promulgation of the emergency on the very grounds given by the regime?

But this is not all. In paying a compliment to counsel Justice Beg observes that counsel had not merely argued his case before the Supreme Court so well but also before the High Court, indeed, to a point that "a case *so flismy* as that of his client succeeded before the High Court" (p. 326). He then went on, magnanimously, to rectify proof mistakes in his opinion in *Indira Gandhi* which "for reasons beyond our control" had "to be typed and cyclostyled in a great hurry without sufficient opporunity for a careful reading and necessary corrections of accidental slips and errors before and after it was cyclostyled" (p. 326). Whence this hurry? What were these reasons beyond the Court's control? Has the Court no reponsibility in regard to accuracy of its decisions? (The problem was later to arise again in the *Habeas Corpus* case, which we will discuss later). In any case, the review petition was preferred *not* in regard to printer's devils but "very palpable errors" in appreciating the evidence before the Allahabad High Court.

It is truly extraordinary that in a review petition on the ground that natural justice was not afforded by the Court, the Court should allow observations which themselves further violate the principles of natural justice. And it is astounding in a petition seeking expunction of certain unwarranted, and even undesirable features of the main opinion, more such features should be added in a decision denying relief. It is equally astounding that the rest of the Justices simply withdrew from the scene and let Justice Beg embody the majesty of the Supreme Court in his single person. Surely, no one, including the regime, would have decried Justice Beg if he had declined to sit on the bench in which a review petition affecting his main decision was involved. Even if he sat, he should have let his brother Justices deal with the petition, scrupulously assuring them that he would not in the least bit be upset if they were to grant the relief, since what he did in the main judgment was something that he had to do in the discharge of his duties as a conscientious judge.

As Justice Beg himself says: "Judicial process does not always produce the expected" (p. 325). But there is a difference between production of that which is unexpected and of that which is, by any standards, unwarranted. When, therefore, in his post-emergency decision in *Sham Lal* he complains that no review petition was brought to correct the manifestly wrong order in *Shiv Kant*, he is overlooking the fear of the unexpected and unwarranted results, that he so vividly demonstrated that judicial process is capable of producing, at least at some hands.

I. THE GRANDIOSE AND MINIMAL STRATEGIES OF ARGUMENT IN SHIV KANT

We now turn to the fateful decision.

It is necessary at the outset to note as to how the habeas corpus problems reached the Supreme Court. The High Courts of Allahabad, Bombay, Delhi, Karnataka, Madhya Pradesh, Punjab and Rajasthan rejected the preliminary contention of the State that the habeas corpus petitions by or on behalf of the detenues were worthy of dismissal *in limine* in view of the Presidential Order dated June 27, 1975, which

suspended the right to move the courts for enforcement of Article 21. As against this, three High Courts of Andhra Pradesh, Kerala and Madras—upheld this preliminary objection. The seven High Courts which rejected the preliminary contention did so on the ground that it is open to the detenues, notwithstanding the Presidential Order, to show that their detention is *ultra vires* or in excess of powers delegated or that the power is exercised in violation of conditions precedent to its exercise or finally that the detention order is not in strict conformity with the provisions of the relevant Act. Some High Courts further held that detention orders could be challenged on the ground of *mala fides* "as, for example, by showing that the detaining authority did not apply its mind to relevant considerations or that the authority was influenced by irrelevant considerations, or that the authority was actuated by improper considerations". The seven High Courts listed the petitions for hearing on merits, at which stage the State and the Union governments moved the Supreme Court. (There were also some special leave petitions and other petitions came to the Supreme Court on certificates granted by the High Courts: p. 647).

As a matter of legal strategy, what the State was primarily interested in was to secure the proposition that petitioners had no *locus standi* to file petitions for *habeas corpus*. But beyond that the State did not wish to go, as is shown by the fact that the Attorney General himself conceded at the outset of his argument that the Court may "grant relief if the detention order is on the face of it bad, as for example, if it is passed by a person not authorized to pass it, or if it is passed for a purpose outside those mentioned in Section 3(1) of the MISA or if it does not bear any signature at all".

The respondents' arguments went further than the simple proposition of law, clearly established in Indian jurisprudence (and, therefore, conceded by the Attorney General) that even during the emergency, the executive must strictly follow the authority of the detention statute and that any traversing of that authority must result in invalidation of the purported exercise of that authority (on the grounds, broadly, of ultra vires). They went much further. They argued, more generally, that suspension of rights under Article 21 does not entail suspension of the *rule of law* during national emergency, that the "obligation to act in accordance with the rule of law . . . is a central feature of our constitutional system and is a basic feature of the Constitution". They further argued that Article 21 is not the "sole repository of right to life and personal liberty" and, therefore, pre-existing rights cannot be held to be suspended under that Article. Any other interpretation, they contended, would result in a *carte blanche* to the Executive to "whip the detenues, to starve them, to keep them in solitary confinement, and even to shoot them". They argued that the Presidential Order "cannot permit the reduction of the Indian citizen into slaves" (p. 650). They also challenged Section 16A(9) of the MISA as unconstitutional on the ground that it curtailed the powers of the High Courts under Article 226 without a proper amendment of the Constitution. They, in fact, argued that the Presidential Order, while it might take away the power of the Supreme Court under Article 32, it could not (without express constitutional amendment) take away the power of the High Courts under Article 226, with its wide-ranging "any other purpose" formula.

What was the basic strategy of counsel for the respondents? Clearly, if their objective was to secure (what I may call) minimal due process in the administration of the MISA, this was served by the specific contention that the executive must act, at *all* times, in conformity with the statute, and courts must give relief whenever power was exercised *ultra vires* the Act. For this proposition arguments concerning the pre-existing nature of the right to life and liberty were scarcely necessary; nor were the arguments maintaining that the "rule of law" was a basic feature of the Constitution. All that was needed was the simple reiteration of some basic principles of legality, embodied in the *corpus* of administrative law and crystalized by various High Courts in the habeas corpus petitions For example, the Madhya Pradesh High Court had laid down clearly and categorically that the Presidential Order did not bar,

and could not bar judicial review of detention orders on the grounds of either ultra vires or *mala fides* (non-application of mind to the relevant considerations, *e. g.* "whether the order at mentions all the grounds specified in the Act and in the affidavit of the authority only some of them are relied on or mentions 'law and order' instead of 'public order' as the ground" : *Shiv Kant* v. *Addl. District Magistrate*, 1975 Cr LJ 1809, 1814-15 per A.P. Sen, J.).

Obviously, petitioners were not content with arguments of this limited scope. They were interested in establishing a wider proposition which was that although the rights guaranteed under Article 21 were suspended (in terms of denial of *locus standi*), there remained other pre-existing rights to life and personal liberty, distinct from Article 21 rights, which could still be enforced through courts. The essential theme here was that Article 21 is not the sole repository of the right to life and personal liberty; if that was the case, suspension of Article 21 remedies was not decisive against the enforcement of these rights. Ancillary to that argument was the contention that the High Courts were under Article 226 given the power not merely to issue writs for the purposes of the enforcement of fundamental rights but also "for ony other purpose", which description embraced enforcement, through writs, of rights conferred by statute. The obvious consequence of this latter argument was that the Presidential Order cannot curtail the jurisdiction of High Courts — something which could only be accomplished through an amendment of the Constitution under Article 368.

But this was not enough for the learned Counsel on behalf of the respondents. They further impugned the newly inserted Section 16A(9) of MISA undeterred by the fact that the two High Courts, which considered the challenge to it, upheld the validity of that section. Under this section, detenues in respect of whom declaration was made under Section 16A(2) and (3) of the MISA, no grounds for detention were to be furnished. Justice Khanna was to point out the impropriety of this contention as he felt that this had to be examined more

appropriately under proceedings other than those involved in the case (p.774-75).

There were thus two strategies of argument, one of which we call the 'minimal' and the other 'grandiose'. The grandiose strategy sought to reserve maximum power of judicial review of detention orders by High Courts; the minimal strategy asked for only a minimum amount of fairness and minimum adherence to legality on the part of the Executive. The main planks of the grandiose strategy, as noted, were the insistence on the thesis that there were pre-existing rights which cannot be affected by the Presidential Order and that the remedies for violation of these rights lay in Article 226, which can only be modified by a constitutional amendment. The grandiose strategy, in effect, asked the Supreme Court to hold that while it cannot, when Article 21 remedies were suspended, issue writs of habeas corpus, the High Courts could. It also asked the Court to affirm that the 'rule of law' was a basic feature of the Constitution.

But even the grandiose strategy did not incorporate the elements of an overt political challenge to the regime of the emergency. The respondents did not challenge the validity of any part of the Thirty-Eighth and Thirty-Ninth Constitution (Amendment) Acts. They did not assail the legality or *bona fides* of the declaration of 1975 emergency. Indeed, excepting Mr. Ram Jethmalani who in his arguments described the emergency as 'phoney', all learned counsel, including Mr. Shanti Bhusan, acquiesced in the submission that for the purposes of the case the Court "may proceed on the assumption that the declaration of emergency under the proclamation dated June 25, 1975, is valid" (per Bhagwati, J., p. 689).

The grandiose and minimal strategies of argument, avoiding direct challenge to the regime of emergency, thus structured the scope of the judgment of the Court. The Court was asked to accept that the declaration of emergency was valid and yet asked to hold that certain *juridical* consequences following the declaration were *not* valid. This was no easy task, as even the dissenting opinion of Justice Khanna shows. Critics

of the Court ought to examine not just the judgments, but the argumentative strategies which subtly set the context of judgment-making. For good or bad, the law is made not, in Bentham's words, by judges alone, but by "judge and co."—that is, by judges *and* lawyers acting in concert. One may well speculate that the outcome might have been different if some aspects of the Thirty-Eighth and Thirty-Ninth Amendments had been challenged preliminary to the challenge adopted through both the grandiose and minimal strategy. This was not to be; each lawyer went about on his own. Counsel involved on behalf of detenues (as far as my information goes) never met in a conference with a view to perfect strategies of arguement. The Court stood thus deprived of the collective wisdom of the Indian Bar.

(i) *Justice Khanna's Dissent: The Chequered Career of the Grandiose Strategy*

Indeed, the grandiose strategy was fully accepted in the memorable dissenting opinion of Justice Khanna. No accolade is high enough for the moral vision and personal courage which underlines it. In the annals of civil liberties and judicial independence, Justice Khanna's dissenting opinion has earned him a place among the immortals. But it is for that very reason that we lament the fact that his remained a solitary dissent; and the fact that he was not able to persuade his brother justices to join him in forming the majority. To ask the question why did this not happen is to examine the major weaknesses of the grandiose strategy of argument. If, therefore, in what follows we sprinkle a bit of analytical acid on Justice Khanna's opinion, which vibrates with humanism and democratic vigour, I do not do so to detract from the high praise it merits in itself nor do I wish to indulge in logic-chopping for its own sake. Rather, I wish to explore the riddle that his opinion did not become one of the Court, in the belief that clear logical analysis is an ally, rather than a foe, of human rights.

(ii) *Natural Rights Position*

Justice Khanna takes it as axiomatic that right to life and

liberty, "a facet of higher values which mankind began to cherish in its evolution", existed and was in force before coming into force of the Constitution. The principle "that no one shall be deprived of his life and liberty without the authority was not the gift of the Constitution" (p. 748). "Sanctity of life and liberty was the cornerstone of the distinction between a lawless society and one governed by laws." Even in the absence of Article 21, the State "has no power to deprive a person of his life and liberty without the authority of law" as this is "the essential postulate and basic assumption of the rule of law and not of men in all civilized nations" (p.749). Justice Khanna makes a large-hearted recourse to Plato, Coke, Blackstone, The American Declaration of Independence, the Human Rights Instruments under the United Nations auspices, the work of the International Commission of Jurists and the Declaration of Delhi (pp. 746-49). He then draws the conclusion that there is in civilized societies the higher value of "sanctity of life and liberty". There is a pre-existing right, which in the context so far delineated, must amount to a natural right, although Justice Khanna avoids using that term. He does so partly because of Section 18 of the MISA which makes it applicable, overriding any common or natural rights to the contrary. He is unable to strike down Section 18 and yet imports a very impressive array of jurisprudential learning to suggest that the pre-existing right to life and liberty is an unalienable aspect of "evolution of mankind" and "civilized society". In other words, he wants to say that the pre-existing right is a natural right as well as statutory right: but he is unable to say that it is a natural right in terms because in that case Section 18 will have to be more firmly dealt with, something that he is *not* prepared to do.

There is another reason for Justice Khanna's avoidance of the term 'natural rights'. And this is that he had clearly and categorically denied that there are any natural rights which can be pressed to limit the scope of the amending power in the Constitution (Article 368) in *Kesavananda*.

Justice Khanna departs from his own *Kesavananda* opinion

where he stressed the view that "natural rights have no proper place *outside* Constitution and the laws of the State". He had said:

> It is up to the State to incorporate natural rights, or such of them as are deemed essential, *and subject to such limitations as are considered appropriate, in the Constitution or laws made by it.*

He went further to say that not merely natural rights were not in themselves enforceable but that "those rights having been once incorporated in the Constitution and the Statute, can be abridged or *taken away* by amendment of the Constitution or the Statute [(1973) 4 SCC p. 781, emphasis added]. In fairness to Justice Khanna, one must immediately add that he was entitled to change his views, even drastically; and the situation before him made demands of justice which outweighed claims of analytical consistency. But by the same token, we are not entitled to castigate the opinions of Justices Chandrachud and Bhagwati who held themselves bound by the express view of seven justices, including that of Justice Khanna, that *Kesavananda* not merely denied existence of legally cognizable natural rights limiting the scope of amendatory power but also denied that there were any natural rights under the Constitution (see *per* Chandrachud, J. at p. 647; *per* Bhagwati, J. at p. 717).

One wishes that Justice Khanna had explained the difference between his positions in *Kesavananda* and his resort to natural rights in *Shiv Kant*. One also wishes that his resort to natural rights had been more explicit. He could have endeavoured to explain the discourse of seven judges who held the notion of natural rights irrelevant to Article 368 power on the ground that the basic issues in the two cases were different. Indeed, Justice Khanna could have quoted chapter and verse from all the opinions, including his own, in *Kesavananda* and *Golak Nath* which articulated the argument of fear that amending powers may be used to convert India into an authoritarian State or a police State to show that that argument was, unfortunately, not misplaced as he and other justices felt in 1967 and 1973. No greater proof of this was needed than the fact of *second* declaration of emergency, wide-ranging changes in the MISA, the inclusion of MISA in the Ninth Schedule, and the

drastic scope of the Presidential Order. Feeble references to the lamented Wolfgang Friedmann's comments on whether laws of Nazi Germany could be called laws (p. 756) were simply anachronistic in the India of 1976, in a petition for *habeas corpus*. Justice Khanna's studied silence on the judicial preoccupation with natural rights in *Golak Nath* and *Kesavananda*, and his reticence in arguing from a frankly naturalistic position, unnecessarily weakens the persuasive force of his dissent. This also illustrates the limitations of the grandiose argumentative strategy, which failed to mount a broad attack on the constitutional front in *Shiv Kant*.

(*ii*) *The Argument from Pre-existing Right to Life and Personal Liberty*

The second strand in Justice Khanna's argument is frankly positivistic. One aspect of this is his insistence that the right not to be deprived of life and personal liberty pre-existed the Constitution and continued, despite Part III and Article 21, as "law in force" by virtue of Article 372 of the Constitution. Justice Khanna cites the Indian Penal Code and Section 491 of the old Criminal Procedure Code as examples of this. Indeed, he meets the challenges posed by Section 18 of MISA head-on: that that section denied to detenues any right to personal liberty by virtue of natural law or common law. Justice Khanna claims that the pre-existing rights to personal liberty if neither natural law nor common law rights were still *statutory* rights. Like a good positivist, he then argues that Section 3 of MISA, concerning the grounds for detention, itself conferred certain statutory rights which cannot be denied even during the emergency. [Indeed he suggests that Section 3 could have been attacked on the ground that it was an excessive delegation of power, and amounted to abdication of legislative power. It is not surprizing that the grandiose strategy simply failed to make precisely this kind of challenge (p. 753)].

But at the level of strict analysis a major question immediately arises: Is this pre-existing right any different from the right not to be deprived of life and personal liberty except in accordance with the procedure established by law? Justice

Chandrachud pointedly raises this question: What is the "qualitative content" of the pre-constitutional right to personal liberty? Is it "different from the content of the right to personal liberty conferred by Part III ?", he asks. To this question the dictum that Article 21 is not the "sole repository of right to life or personal liberty" provides no answer. This is because the question arises only *after* the dictum is conceded. Justice Khanna is not really able to respond to this question. Instead, he points out that any idea of regarding Article 21 as the sole repository of life and personal liberty will lead to the bizarre consequence that "suspension of a right to move a court for enforcement of Article 21 would also (thereby) result in suspension of the right to move any court for enforcement of penal laws" (p. 752). But that is, with great respect, a consequence of loose thinking more than anything else. Certainly, the Presidential Order did not and cannot suspend the operation of the Indian Penal Code or of the Criminal Procedure Code. Certainly, MISA did not as a matter of law (though tragically, it did as a matter of fact) suspend any one's right to life. It was perhaps in response to this kind of argument that Justice Bhagwati is at great pains to explain that the position under criminal law is not affected by his decision to regard Article 21 as the "sole repository of right to life and personal liberty". His words need to be quoted in full:

> If the Executive detains a person contrary to law or shoots him dead without justifying circumstances, it would clearly be an offence of wrongful confinement in one case and murder in the other, punishable under the relevant provisions of the Indian Penal Code .... The Presidential Order suspending the enforcement of Article 21 would not bar such a prosecution and the remedy under the Indian Penal Code would be very much available. The offence of wrongful confinement or murder is an offence against society and any one can set the criminal law in motion for punishment of the offender. When a person takes proceeding under the Code of Criminal Procedure in connection with the offence of wrongful confinement or murder or launches a prosecution for such offence, he cannot be said to be enforcing the fundamental right of the detenue or the murdered man under Article 21 so as to attract the inhibition of the Presidential Order (p. 719).

To all this, we do not have any cogent answer from Justice Khanna. Perhaps, no cogent answer is possible (as one can gather from a critical reading of Seervai's attempt at rebutting Justice Bhagwati) (1978: pp. 36-42). This then manifests the weakness of the grandiose strategy of argument. Indeed, on the view that Justice Bhagwati adopts, even when Article 21 is held to be the repository of rights to life and personal liberty, he is able to traverse much further than Justice Khanna in *identification* of statutory rights other than Article 21 type of rights which *cannot* be barred by a Presidential Order. He is able to distinguish carefully and clearly between reliance on a "provision of law to enforce a legal right" upon a detenue *forever* permissible from that of "absence of legal authority in the matter of deprivation of his personal liberty" (*see* pp. 719-21). Justice Khanna later agrees with Justice Bhagwati when he states that rights "created by statutes are not fundamental rights ....and as such statutory rights cannot be suspended under Article 359(1)" (p. 762). Thus what Justice Khanna is in effect saying is not that there is a pre-existing non-constitutional or pre-constitutional right against deprivation of life or personal liberty except in accordance with procedure established by law but only that such rights, if established by procedure of law, have an independent existence beyond the reach of the emergency powers. This in itself is not a momentous standpoint. But if it is to be so regarded, it derives its force from Justice Bhagwati's rather than Justice Khanna's opinion.

(*iii*) *The Argument from the "Startling Consequences" Rule of Construction*

Justice Khanna then moves on to justify his view by reference to two well-known rules of statutory construction. One is that statutes should be so construed as to avoid strange and manifestly unjust results when an alternative construction avoiding this result is available. The second rule of construction relied upon is that if two constructions of municipal law are possible, the Court should "lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with the international law or treaty obliga-

tions'' (p. 754). Both these are sound maxims; let us follow Justice Khanna in their extension to the present case.

On the first maxim, Justice Khanna paints the picture of startling consequences, if the view that Article 21 is the sole repository of life and liberty were to be accepted. He says that this would mean that:

(*i*) ''if any official, even a head constable of police, capriciously or maliciously arrests a person and detains him indefinitely without any authority of law, the aggrieved person would not be able to seek any relief from the courts during the period of emergency.'';

(*ii*) ''it would not be necessary to enact any law on the subject and even in the absence of any such law, if any official, for reasons which have nothing to do with the security of State or maintenance of public order, but because of personal animosity, arrests and puts behind the bars any person or a whole group of persons, the aggrieved person or persons would not be able to seek any redress from a court of law.'' (p. 754).

Justice Khanna says that the same would be the case for deprivation or ''eventual deprivation of life of a person'' (p. 754). These are, he says, ''permissible consequences'' of that view of Article 21 which regards it as sole repository to the right of life and liberty. He says these are the startling results, which necessitate alternative, and less drastic, construction.

Unfortunately, and tragically, these very startling consequences ensued. This demonstrates not just Justice Khanna's prescience but also the perfidious aspects of the regime. But it is doubtful if the majority of justices stated or implied the second proposition stated above that *no* law was necessary for detention, or that absence of law would still ''authorize'' the executive to detain people at whim or caprice. Nor is the first proposition true of the opinions delivered by Justices Beg, Chandrachud and Bhagwati. *Even* Justice Beg held, in the operative part of his opinion, that a detention order has to be *prima facie* valid, that is to say ''one duly authenticated and passed by an officer authorized to make it (note: this excludes head-constables!), recording a purported satisfaction to detain'' (p. 644). Justice Chandrachud also said: ''[S]o long as the statutory prescription can be seen on the face of the order to have been complied with, no further enquiry is permissible as to whether the order is vitiated by legal *mala fides*'' (p. 673). Giving his views on Section 16A(9) (a section on which Justice Khanna expresses no opinion), Justice Chandrachud doubts whether a charge of factual *mala fides* could ever be satisfactorily proven: indeed, without accessibility to grounds of detention, ''a charge of factual *mala fides* can only be a fling in the air and cannot succeed'' (p. 675). Justice Bhagwati, as noted, was clear that ''if a petition or other proceeding in court seeks to enforce a positive legal right conferred by some legislation, it would not be barred by the Presidential Order''. He said clearly that despite his view that Article 21 was a repository of legal right to life and property

> whenever a petition for *habeas corpus* comes before the court, it must (not) be rejected straightaway... The court would have to consider whether the bar of the Presidential Order is attracted and for that purpose, the Court would have to see whether the order of detention is one made by an authority to pass such an order under the Act; if it is not, it would not be State action and the petition would not be one for enforcement of the right conferred by Article 21 (p. 721).

All this elaboration is to show that at least three justices did not attach the consequences which Justice Khanna feels would necessarily attach to the view that Article 21 is a sole repository of the right to life and personal liberty. If this is the case, it must follow that the invocation of the maxim of statutory interpretation was indeed superfluous.

(*iv*) *International Law in the Service of Constitutional Interpretation*

On the application of the second maxim, Justice Khanna says that ''while dealing with the Presidential Order... we should adopt such a construction'' as would avoid conflict

with the provisions of the Declaration of Human Rights. He says that Article 51 of the Constitution obligates the Court to accept that interpretation, when an alternative course of interpretation is available, which would subserve rather than subvert "International Law" and "treaty obligations". This in the abstract is a worthwhile approach. The question is whether it achieves, in the present context, the results he wants to achieve.

We set aside, at this juncture, the vexed question whether the Declaration of Human Rights is in fact a part of international law. Every student of international law knows the rich but somewhat perplexing diversity of juristic opinion and State practice on the matter. It is, of course, clear that it is not a treaty obligation; and the faint hint (on p. 755) that India's support to the Declaration amounts to some kind of estoppel is just not to be taken seriously. But let us assume or accept that the Declaration is a part of international law, and let us also assume that two interpretations of the Presidential Order are indeed possible. How does the Declaration-oriented approach help the respondents in *Shiv Kant*?

Justice Khanna's answer is that the Presidential Order should be so construed

> as not to warrant arbitrary arrest or to bar the right to an effective remedy by competent national tribunals for acts violating basic right to personal liberty granted by law (p. 755).

This is an amalgam of Articles 8 and 9 of the Declaration. The latter requires that: "No one shall be subject to arbitrary arrest, detention or exile". Article 8 declares that the "right to an effective remedy is predicated for acts violating fundamental rights granted him by the Constitution or law". It is clear that the right thus assured is a right in turn predicated upon the fundamental rights guaranteed by the Constitution or the law. Similarly, the arbitrary nature of detention is also to be determined with reference to the Constitution and the law. There is, in these provisions, no advertence to minimum

international standards which constitutions and laws must in fact observe.

Of course, the underlying idea of immunity against arbitrary arrest must be that such arrest is 'arbitrary' when it is without the authority of the law (that is broadly *ultra vires* or *mala fide*). And the effective remedy must be also that any allegation of such excess of power, or really the lack of legal authority, should be open to challenge in courts and further that appropriate remedies should be available.

This, we must note, is the essence of the minimal argumentative strategy. But how does the Declaration help us to go beyond this minimal notions of legality? Such notions already pre-exist in the national law and judicial review on the grounds mentioned here was conceded by the State.

We do agree with Justice Khanna's stirring words that much "more is at stake in these cases than the liberty of the few individuals or the correct construction of the wording of the Order" and that "what is at stake is the rule of law" (p. 766). But how does the Declaration-oriented interpretation help salvage the rule of law, beyond the requirement of minimal legality? Section 16A(9) of the MISA did, to a major extent, bar the proof of actual *mala fides* (although in some cases as Seervai suggests this could have been overcome by relaxing the onus and through an activist extension of the doctrine of judicial notice: Seervai, 1978). How does the invocation of the Declaration help to meet the problem thus created? Very much the same question arises with regard to Article 359(1) and the Presidential Order made thereunder. What light does the Declaration throw on the scope of the Order and the Article? It only, more explicitly, invites our attention to the Constitution and the law. But we refer to the Declaration in the first place because we want to illuminate the meanings of the Article and the Order! The result is that no real element of grandiose strategy is served by the reference to the Declaration. If it has the potential to do so, Justice Khanna's dissent does not really indicate it, thus surrendering a valuable argument of persuasive force for his brethren.

Justice Khanna's invocation of Chief Justice Sikri's opinion in *Kesavananda* is also not without its poignancy. Justice Sikri, while attempting to limit the scope of Article 368, observed that "this Court must interpret the language of the Constitution, if not intractable, . . . in the light of the United Nations Charter and the solemn declaration subscribed to by India" (*Kesavananda*, p. 333). Justice Khanna, on that occasion, differed from Justice Sikri. He reiterated the principle that inconsistency with the Charter and the declaration is only to be avoided when alternate interpretations of the provision of the Constitution are available. But Article 368 is "clear and unambiguous" and "I am, therefore, not prepared to accede to the contention that a limitation to the power of amendment should be read because of the Declaration of Human Rights in the UN Charter" (p. 785-86). One wonders whether Article 368 was any more "clear and unambiguous" than Article 359(1) or the Presidential Order. Once again we say this not to belittle Justice Khanna's dissent. But from the standpoint of judicial craftsmanship, one would have appreciated some articulation of his own *Kesavananda* positions in the present dissenting opinion. And *Shiv Kant* was the only case in India where, in terms of human costs, claims of craftsmanship were as pressing as those of high constitutional vision.

(*v*) *The Metaphysics of Makhan Singh and the Rule of Law Argument*

Much space is devoted in the majority opinions on what I'd like to call the 'metaphysics' of *Makhan Singh* (AIR 1964 SC 381). Broadly, the contention under investigation was whether the court could provide any relief to detenues despite the Presidential Order of June 27, 1975, declaring that "the right of any person to move any Court for the enforcement of rights" conferred by Articles 14, 21 and 22 and "all proceedings for the enforcement" of these rights, shall "remain suspended" during the period of the proclamations of emergency made in 1971 and 1975. The earlier emergency of 1962 also, by the Presidential Order, barred the right to move the Courts on grounds of Articles 14, 21

and 22; but it was qualified by the reference "if such person has been deprived of any such rights" under the Defence of India Act, 1962 or any rule or order pursuant to the Act. In the jargon of *Shiv Kant*, the 1962 order was conditional whereas the 1975 order was unconditional. The effect of a 'conditional' order of 1962 was that that detenue could (as held in *Makhan Singh*) move the Court if

(*a*) he is pleading violation of the mandatory provisions of the Act, this being a right *outside* the Presidential Order;

(*b*) he raises the plea of *mala fides,* which would of course render the action outside the Act;

(*c*) he raises the substantive right under Section 491(1) of the Criminal Procedure Code;

(*d*) he raises the plea of excessive delegation which raises a plea not relatable to fundamental rights specified in the Presidential Order.

The short question was whether any or all of these pleas were available under the Order of June, 1975. These pleas *were* available if Article 359(1) was read to mean that such pleas were outside the scope of that very Article. These were, however, not available if they were to be related to the specific Presidential Order of 1975. Obviously, a vital technical question was involved as to how not merely Article 359(1) and the Order should be construed, but also as to how *Makhan Singh* may be construed.

I shall not follow the exegesis on *Makhan Singh* and Article 359(1) offered by Justices Chandrachud and Bhagwati in this lecture. The exegesis is no doubt crucial to the understanding of their positions and the overall legalistics of the decision itself. But a pursuit of exegetical exercises, a valid pursuit in the chambers of judges, lawyers and jurists, might only be an invitation to tedium in a public lecture.

Nevertheless, a broad review of their positions is necessary. On the argument of Article 359(1), Justice Chandrachud reasoned that it is an enabling provision; it is only the

Presidential Order which suspends the right to move any court for certain rights specified therein. Therefore, observations in *Makhan Singh* manifestly relatable to Article 359(1) must be read down to really relate to the Presidential Order (p. 672). Justice Bhagwati takes great pains to highlight the point that *Makhan Singh* was really addressing itself to the Presidential Order (pp. 715-16) which in that case was "conditional" unlike the 1975 Order. Justice Khanna does not prefer to meet any of these points in his dissent. While this costs him the lack of persuasion of his brethren, his dissent is refreshing since he starts with the first principles of judicial protection of civil liberties. One such principle is that any law or order depriving the liberties of people has to be construed strictly (p. 762). He also takes the view, rightly so, that changes in the phraseology of the 1975 Order merely means that the Court could only rely "upon the observation in these cases which were not linked with the phraseology of the earlier Presidential Order" (p. 745). On this, he acquiesces with Justice Chandrachud that "no judgment can be read as if it is a statute" (p. 671), with, of course, tellingly different results.

How does Justice Khanna proceed to extend the benign impact of *Makhan Singh* to the *Shiv Kant* situation? His reasoning here is quite complex and occasionally difficult to unravel. Broadly speaking, he takes three positions. One is the argument from the rule of law. The other is his refusal to pronounce upon the constitutional validity or otherwise of the new Section 16A(9) of the MISA. And finally there is the argument that Article 226 power somehow survives the Presidential Order under Article 359(1). The cumulation of these three positions enables him to, in fact, claim a more favoured position for the respondents in *Shiv Kant* than the seven judges were able to secure for the detenues in *Makhan Singh*.

The first (rule of law) argument is quite simple and also effective. Justice Khanna is categorical that the rule of law—in the sense of the need to justify assertion of executive power by reference to valid legislative authorization—simply cannot

be suspended by any type of Presidential Order. Justice Khanna cites a large number of Supreme Court decisions to substantiate the view that "executive authorities cannot under this rule of law take any action to the prejudice of the individual unless such action is authorized by law. *A fortiori* it would follow that under the rule of law it is not permissible to deprive a person of his life and personal liberty without the authority of law" (p. 758). Action which is arbitrary or *mala fide* will obviously be outside law. Justice Khanna insists, and rightly, that "the power of the courts to grant relief against arbitrariness or absence of the authority of law in the matter of the liberty of the subject may now well be taken to be a normal feature of the rule of law" (p. 759). From this standpoint Justice Khanna has no difficulty in insisting that the newly introduced Article 359(1A) "does not dispense with the necessity of the competence to make law or take executive action", a competence "*de hors* the restrictions of fundamental rights" (p. 760).

From all this, Justice Khanna concludes that for deprivation of life and personal liberty two requirements must be satisfied. The first is that power for such deprivation must be conferred by law upon an authority and second the law must also "prescribe the procedure for the exercise of that power" (p. 760). He reads Article 21 as containing both the substantive power and the power to make procedure for such deprivation. The result is subtle. Justice Khanna argues that the suspension of the right to move the court for enforcement of Article 21 rights may mean that the aggrieved is deprived of the *locus* to plead that the right to a procedure prescribed by law has been denied. In other words, the suspension of the right to move any court for enforcement of Article 21 may "have the effect of dispensing with the necessity of prescribing procedure for the exercise of substantive power to deprive a person of his right to life and personal liberty". But this would, holds Justice Khanna, never, never have the effect of debarring an aggrieved person from approaching the courts with the "complaint regarding deprivation... by an authority on the score that no power has been vested in the authority to deprive

a person of life or personal liberty" (p. 671). Through this rather fine distinction, Justice Khanna operationalizes the meaning of the rule of law in the instant situation rather nicely. The suspension of remedies for Article 21 rights may extend to the questions of the procedure established by law for deprivation of life and personal liberty. But the rule of law notion absolutely forbids the ouster of judicial scrutiny of the claim that the purported action of deprivation is bereft of the substantive power. Thus it is that the rule of law notion is in *this* sense unsuspendable even during the emergency.

This proposition, unfortunately, does not find support with at least three justices. Chief Justice Ray denied that there was "any pre-Constitution or post-Constitution rule of law which can run counter to any rule of law to nullify the constitutional provision during the times of emergency" (p. 585). The underlying intention of this observation is clear but not much else besides that. Justice Beg too felt that during the emergency, the emergency provisions of the Constitution constitute the rule of law. In other words, if detenues are deprived of *locus standi* and courts deprived of the power, "it is no use appealing to this particular concept of the rule of law" (p. 630). Justice Beg, who has developed in preventive detention cases what may be called as a theory of "executive justice" says also that despite lack of judicial supervision of the executive, it is not to be thought that

> there is no rule of law during the emergency or that the principles of *ultra vires* are not to be applied at all by the authority except when, on the face of the return itself, it is demonstrated that the detention does not even purport to be in exercise of the executive power.... It seems to me that the intention behind emergency provisions and of the Act is that, although such executive action is not susceptible to judical appraisement, ...yet it should be honestly supervized and controlled by the hierarchy of the executive authorities themselves. It enhances the powers and, therefore, the responsibilities of the Executive (p. 637).

Justice Chandrachud, after a "close examination" of the contention of the respondents that the Presidential Order cannot "ever suspend the rule of law" declares that the rule of law "during an emergency is as one finds it in the provisions contained in Chapter XVIII of the Constitution". He adds: "There cannot be a brooding and omnipotent rule of law drowning in its effervescence the emergency provisions of the Constitution" (p. 661). This statement is unresponsive to Justice Khanna's subtle analysis canvassed above. That interpretation does not, by any means, "drown" the emergency provisions but merely identifies their true scope.

One must turn to the analysis of Justice Bhagwati for a sensitive grappling with the problems posed by Justice Khanna's analysis. He recognizes that the executive is a limited executive, bound by the principle that it should act only in accordance with the law. This was the position before the Constitution and remains so after its commencement. But he maintains that the principles of legality were specifically embodied in the various provisions of the Constitution and thus transcended the "realm of unwritten law". Article 21 is one example of this embodiment. Once the basic principles of legality have moved from the realm of unwritten to that of constitutional articulation, no question of reliance on the pre-existing principles of legality arises. With the suspension of remedies for Article 21 violation, no separate principle of legality can really assist the respondents in this case. But mere suspension of remedies, for the time being, is not the same as the suspension of principles of legality. Justice Bhagwati is insistent that "there can be no doubt that the executive is bound to act in accordance with the law" and it "cannot flout the command of the law". Action contrary to law will still be unlawful action because "the unlawful characteristic is not obliterated by the Presidential Order under Article 359(1)" (p.719).

In this clear assertion, Justice Bhagwati comes close to the Khanna position concerning the provenance of the rule of law during national emergencies. This closeness is reinforced when we recall that Justice Bhagwati specifically leaves open all assertions of statutory rights before courts which do not in terms involve prayers for relief on the specific ground of violations of Article 21.

The second related argument concerns the preservation of jurisdiction of the High Courts under Article 226 despite the Presidential Order. Justice Khanna reads that Order as leaving unimpaired the powers of courts to grant relief for purposes other than the enforcement of fundamental rights mentioned in the Order. The "any other purpose" limb of Article 226 survives even the inroads of Article 359 and national emergencies, declared on whatever grounds.

The second step in the preservation of the wide jurisdiction of the High Courts is to insist that Article 226 is "an integral part of the Constitution" and is sustained by a "clear demarcation of the spheres of function and power in our Constitution" (p. 765). That is why, Justice Khanna explains, "no power has been conferred upon any authority in the Constitution for suspending the power of High Courts to issue writs in the nature of *habeas corpus* during the period of emergency". The Court cannot, he maintains, bring about such a result by "putting some particular construction on Presidential Order" (p. 777).

The third step in reasoning is a splendid and deeply moving rhetoric. The question, says Justice Khanna, is not whether the State has power to impose extensive restrictions on the liberties of the people in an emergency. It has. But the real question is whether "the laws speaking through the authority of the courts shall be absolutely silenced and rendered mute" in such times. Justice Khanna is, through these observations, really invoking the notion of the rule of law (in the sense of negation or reduction of arbitrariness in the exercise of the political power of the State) without simultaneously invoking the basic structure doctrine.

Undoubtedly, this is the heart of Justice Khanna's dissent and this is what makes it truly memorable and moving. Without this specific holding on the preservation of Article 226 power, his opinion would have remained notable only for a noble effusion of good sentiments. His dissent, without this, would have dwindled to fairly unhistoric proportions holding merely that the rule of law required only the minimal protection from arbitrariness apparent on the very face of the detention order.

When this is said by way of tribute to Justice Khanna's dedication to human rights, it remains necessary for the very cause he strove to examine how far the cause was effectively served in the context of the decision. It is in this context that one feels that Justice Khanna's dissent would have gained in stature had he endeavoured to meet the more specific counter-arguments to his position on Article 226 to be found, in particular, in the opinions of Justices Chandrachud and Bhagwati.

Justice Chandrachud reasoned that the power of the High Courts was not in fact taken away by the Presidential Order; what was adversely affected was the *locus standi* of people to move the courts for enforcement of certain rights specified in the Order. Justice Chandrachud stressed that it is "important to appreciate that the drive of Article 359(1) is not against the courts but against the individuals" (p. 655). The only response to this objection to his position in Justice Khanna's dissent is the assertion that Article 226 remains available, for certain purposes, even during the emergency, and that a contrary conclusion should not be brought about "by a strained construction of the Presidential Order under Article 359 (1)" (p. 764). This certainly evades the main point. All legal constructions are strained; some are more so. To say that a particular line of construction is "strained" is not necessarily to demonstrate that it is analytically unsound. The analytical problem is how to reconcile untrammelled High Court Article 226 jurisdiction with Article 359(1). When it is suggested that this cannot be done, one who thinks otherwise must meet the specific arguments as to why this cannot be done. The intellectual onus is even greater upon a dissentient justice, more so in a case like *Shiv Kant*. The reference, in the Khanna opinion, to Lord Atkin, A. M. Dershowitz, the experience of two world wars, and the ECOSEC seminar at Baguio are valuable aids to discursive reasoning; but these cannot replace altogether the lawyer-like analysis of the problems inherent to the distinctively novel, and perhaps, unique, assertions concerning Article 226 power and related constitutional provisions, with a long interpretative history.

Justice Khanna's proposition that no power is conferred upon any authority to suspend the broad powers of High Courts under Article 226 is an attractive proposition. It can even be said that it is of first impression and that the Constitution Bench in *Mohan Chowdhury* v. *Chief Commr., Tripura* [AIR 1964 SC 173] when it held that "unquestionably the Court's power to issue a writ in the nature of *habeas corpus* has not been touched by the President's Order" (p. 177) was to this extent relevant to what Justice Khanna was attempting to demonstrate. As to the outcome in that case, he could have said that it was limited to the question of the scope of Article 32 powers read with Article 359(1). He would, however, have had considerable difficulties in overcoming the more general proposition embracing Article 226 powers in *Makhan Singh*; but yet he could have endeavoured to limit the scope of that decision to its distinctive fact-situation. Justice Khanna is unwilling to cross all these hurdles.

The other countervailing argument in Justice Bhagwati's opinion cuts closer to the bone. He asks: can we adopt a construction by which the detenue is enabled to challenge his detention on that very ground (i.e. enforcement of Article 21) which the Presidential Order in terms forbids? "Can an interpretation be adopted", he asks, "which would reduce to futility Article 359 clause (1) in its application in relation to Article 21? Could the Constitution-makers have intended such a meaning?" (p. 701). He further argues that the "only explanation" which could be given is that the object of Article 359(1) is to suspend the right to move the Supreme Court under Article 32 "but is not intended to affect the right of enforcement of the right of personal liberty based on the rule of law by moving the High Court under Article 226". He finds this explanation wholly unconvincing. Would there be any 'point' in debarring the citizen from having direct recourse to the Court under Article 32 "while at the same time leaving it open to him to move the High Court for the same relief and then come to the Supreme Court in appeal, if necessary"? That, he says, "would be wholly irrational and meaningless" (pp. 701-02).

These questions are not answered merely by stating that constructions which support the powers of the State against the citizen have to be avoided. No one can deny that when there are two constructions available, one favouring the liberties of the citizen and the other more restrictive of these liberties, the former should be preferred. But the capital point for the operation of this wise maxim is that the *two* constructions should not *merely* be open but be *shown* to be open. To show that two alternative courses are open, it would be analytically imperative to refute attributions of "irrationality" and "meaningless" to the provisions of the Constitution. Justice Khanna avoids doing just this.

It could have been said by Justice Khanna in answer to Justice Bhagwati that the Presidential Order under Article 359(1) could only bar the right to move any court for the purposes of enforcement of Article 21. But he was here talking about enforcement of rights other than those fundamental rights which were suspended in this sense. What were these rights? The rights of the detenues under the MISA which were that the detention was not "malicious" or "capricious" or actuated by "personal animosity" (p. 754). But Justice Bhagwati has conceded in his opinion (and so have, though less explicitly, Justices Beg and Chandrachud) that it is consistent with his approach to the interpretation of the Presidential Order that detenues could move any court for the enforcement of statutory rights, without invoking Article 21. The order of the Court, saying otherwise, is monstrously inaccurate as we will show later.

What Justice Khanna has in mind is much more than this, as we find from his very detailed analysis of the principles of "detention jurisprudence" evolved by the Court (pp. 769-73). This analysis yields the following propositions for the guidance of the High Courts:

(*i*) Under Section 3(1) of the MISA it is "essential that the facts on the basis of which the authority concerned reaches the conclusion that it is necessary to detain a person should have a rational nexus or probative value and be germane to the object

for which such detention is allowed. . . ." ; otherwise the order "would be liable to be quashed" (p. 768).

(*ii*) If it becomes "apparent on the record from the admission made by the detaining authority in the return or some other evidentiary material of unquestioned authenticity and probative value that some of the alleged facts upon the basis of which detention order is made are non-existent" the court would be well justified in quashing the detention order (p. 769).

(*iii*) If the authority has not applied his mind to the facts in a "fair and reasonable manner" to the extent that the conclusion arrived at "is so unreasonable that no reasonable authority could ever come to it, the legitimate inference would be that the authority concerned did not apply its mind... and did not honestly arrive at the conclusion" (p. 769).

(*iv*) If the power of detention is exercised "for an improper purpose, *i. e.* purpose not contemplated by the statute, the order for detention would be quashed" (p. 770).

(*v*) A "serious infirmity would creep into the detention order" if the detaining authority is unable to offer an explanation if "the time lag between the prejudicial activity of the detenue and the detention order made because of that activity is *ex facie* long" (p. 771).

(*vi*) The Presidential Order would not "stand in the way of the court quashing the detention order on the score of the infirmity or the vagueness of grounds of detention because of the contravention of Section 8(1) of MISA", even though violation of Article 22(5) of the Constitution may not be open to challenge during the Presidential Order (p. 771).

(*vii*) If the detenue discharges the initial burden of proof that his detention is *mala fide*, or not in accordance with the law, but the "State fails to file a good return and does not place sufficient material on the record to show that the detention is valid, a serious infirmity would creep into the State case as might justify interference by the court and release of the detenue" (pp. 772-73).

This then is *what* Justice Khanna means to save by keeping open Article 226 jurisdiction. No one who cherishes the value of liberty and the rule of law could deny that this was a stupendous intellectual effort on the part of Justice Khanna to ensure, as the proverb goes, that when God closes all the doors, He leaves small windows open. But, by the same token, no such person can ignore, and ought not to ignore, the fact that small windows may indeed be *too* small. Does Justice Khanna, by his forthright declarations of possible infirmities of detention orders, open these windows even by an *inch*?

The answer is that he might have been able to; *but he does not even try*! Please note that almost all the above-mentioned grounds [excepting perhaps (*ii*)] involve some access to materials pertaining to the grounds of detention. But Section 16A(9) of the MISA prohibited communication, disclosure and production of grounds of detention including relevant information and material. Counsel for the respondents assailed the validity of the section and the State also sought to meet this challenge fully in the hearings. Out of the nine High Courts*, only two—Rajasthan and Bombay (Nagpur Bench)—High Courts considered it. The Rajasthan High Court did not read down the section; the Bombay High Court (Nagpur Bench) held that it would be permissible for the Court to call for and peruse the relevant materials. Thereafter, while the appeals were pending, the section was so amended as to bar the production of relevant materials as well.

It is in this context that four other justices considered the validity of the impugned section and came to the conclusion that it was valid. Justice Khanna after making the pronouncements concerning the fairly wide scope of judicial review still

*The total number of High Courts whose decisions are under review in *Shiv Kant* is ten as per Justice Chandrachud's statement of facts; Justice Khanna's opinion enumerates the decisions of nine High Courts.

available *refuses* to express any opinion on this matter. It appears that at some stage in the hearings, counsel for respondents changed their minds and asked the Court not to rule on this matter on the ground that the High Courts had only heard the preliminary objection and that they had not applied their minds to the validity of the section (p. 587). Justice Khanna accepts this position. Chief Justice Ray decries these tactics. He holds that "considerable time was spent on hearing submissions on both sides". And he urges, memorably, that the "time of this Court is the time of the nation".

Justice Khanna seeks to justify his standpoint by saying: "This Court in appeal by the State cannot enlarge the area of unfavourable decision *qua* the State and make its position worse compared to what it was before the filing of the appeal". The Court may not do so "even if on the consideration of relevant provisions" it comes to the conclusion that the section is invalid. "Procedural proprieties", Justice Khanna warns "forbid such a course". What is more, Justice Khanna rules that "it is plainly impermissible to strike down the provision in appeal when the validity of the provision has been upheld by the High Court" (p. 774). He therefore concludes that the Court must wait for an "appropriate occasion" which would arise when High Courts had given their rulings on the issue and the matter came on appeal before the Court (p. 775).

This is a fine, but astonishing in the context, example of judicial rectitude. Astonishing because the reticence on this issue is completely out of character with an opinion which constantly reminds us that what is at stake in this case is nothing less than the preservation of the rule of law in India and that one must, as far as possible, adopt that approach to issues arising which would assist the preservation of the rule of law. The solicitude for the State's liability being unduly enlarged by a pronouncement on the validity of the section becomes incomprehensible when we recall that it was the State which had during the pendency of these appeals changed the law with retrospective effect to ensure that the section would debar the courts from calling for and perusing the materials! Nor is

it wholly comprehensible that judicial propriety would allow extensive arguments and submissions on an issue not dealt with by High Courts but "forbid" a decision on it. In any case, two of the nine High Courts had indeed pronounced on the issue and they at least were entitled to have the Court's final guidance on their rulings. How, for example, was the Rajasthan High Court to be guided by Justice Khanna's reticence, since it had already held the impugned section to be valid? And what was the Nagpur Bench of the Bombay High Court to make of the amended section: how could it have read that down?

Moreover, it is clear that if judicial propriety demanded reticence from Justice Khanna, his brother justices who dealt with the matter and validated the section were really transgressing a serious canon of rectitude. One does not have to accept their propositions wholly or even at all in order to say that such a reflection on brother justices may itself not be proper, unless Justice Khanna is able to support his observations, with reasons better than those he adduces or with authority from the practice and conventions of the Court. This he does not do.

And, one may surmise that Justice Khanna had some good reasons for avoiding the question of the validity of Section 16A(9) of the Act; brother justices who decided to tackle it found it very difficult to hold it invalid or even to read it down. That section, we recall, attached to the declarations made under Section 3(2), (3) and (4) the consequence of confidentiality and enacted a rule of evidence that the relevant "ground, information or material or document" shall "be deemed to refer to matters of State" and that it shall be "against public interest to disclose" any of these. Furthermore, the section prescribed that "no one shall communicate or disclose" any such "ground, material or information or any document containing such ground, information or material". It was contended on behalf of the detenues that the section must be read down as otherwise "it would impede the exercise of its constitutional powers by the High Courts and make it virtually ineffective and hence it would be void as offending Article 226" (p. 727). Of the four justices who each deal with this contention, Justice Bhagwati's

opinion is the most comprehensive as well as most sensitive to the claims of detenues.

He accepts the position that if the rule of evidence enacted by this section is not a genuine rule of evidence but is "only a legislative device adopted.... for the purpose" of preventing the courts from wielding its powers to do justice, it must be struck down or read down (p. 731). Justice Bhagwati finds the detenues' contention to be "undoubtedly very plausible". He also acknowledges that "it caused great anxiety to me". But he finds "on deeper consideration" that he cannot sustain it (p. 731).

Why? *First*, Justice Bhagwati prefaces his analysis by saying that "it is significant" that the section existed in the MISA as originally enacted to meet the emergency declared on December 3, 1971. The only amendment to it made in 1976 is, for him, quite inconsequential (pp. 731-32). This observation has to be understood by a close reading of the earlier portions of Justice Bhagwati's opinion where he is anguished by the difficulties of drawing distinctions between an "external" emergency and an "internal" one. Could the Court say, with any plausibility, that the selfsame section held full sway in the 1971 emergency but that its scope should somehow be restricted in the 1975 emergency? (The situation was further complicated by the fact that, legally, the 1971 emergency was still in force.) *Second*, Justice Bhagwati is able to show that the section "assumes a valid declaration" under the other sections of the Act. The making of the declaration is a "condition precedent" of the operation of the impugned section. Obviously, such a declaration has to be valid. *Third*, he says, whenever detention is made in accordance with the provision of the statute, privilege and "a claim of privilege made under Section 123 of the (Evidence) Act, it would almost invariably be held justified" in the emergency situations. The impugned section enacts the rule analogous to Section 123 "instead of leaving to the discretion of the detaining authority to make a claim and the Court to decide it". Such a rule "bears a close analogy to a rule of conclusive presumption" and "in the

circumstances, it must be regarded as a genuine rule of evidence" (p. 732). Justice Bhagwati makes it quite clear that "if the grounds, information and materials were not, by and large, of such a character as to fall within a class of documents relating to matters of State which it would be injurious to public interest to disclose, I would have found it impossible to sustain this statutory provision as a genuine rule of evidence" (p. 732). But since counsel on all sides, as noted earlier (*see* p. 689) had conceded that the emergency was valid under the Constitution, how can this be ever said?

This is candid agonizing by a justice who finds himself circumscribed by the grandiose strategy of argumentation adopted on behalf of the detenues as also by his disinclination to completely shed the heritage of legal positivism and become a naturalist to meet the demands of times. Surely, Justice Khanna who relies so heavily on Article 226 power should have made an attempt to meet these and related difficulties and anxieties of his brother justices. If he had endeavoured to achieve this in his draft opinion, the result might at least have been a three to two decision. Instead, as seen, he becomes, quite uncharacteristically, suddenly solicitous of the "rights" of the State in its capacity as an appellant and of procedural proprieties.

The impact of this, with all due respect, ostrich-like stance from the standpoint of detenues is that they are not given any tangible substantial relief by Justice Khanna. He, in effect, tells detenues in the case something to this effect :

> I am clear that you can challenge your detention. Please go back to the High Courts and urge the grounds I have so carefully clarified for you. There is, however, this difficulty in your availing these that the State might refuse to produce any information, materials, or grounds related to your detention as the MISA now forbids it. The only way I can help you there is to urge you to contest the validity of that section of the MISA. My brother justices say in this case that the section is valid. This is improper on their part. But if the High Courts also say that it is valid, please come

> back to the Supreme Court. I might tell you, however, that I cannot really say what I or the Court would then decide. I am sorry for this as this would take quite a bit of your time and you may have to languish in jails for some more time. Perhaps, some of you can get release by showing that your detention is invalid because the affidavit filed by the State in reply discloses that the facts on the basis of which you have been detained are non-existent. Your lawyer will explain to you what this means. But if this ground does not apply to your case, please come back to us via the High Courts and we will do the best we can for you under the circumstances.

If detenues at the time were given the gist of this dissent, they might have been heard to say more in sorrow than anger: "Fat lot of good does all this do to us! What's so 'historic' about this opinion?".

(vi) *The Real Tragedy of Shiv Kant*

The real tragedy of *Shiv Kant* lies both in the failure of the grandiose as well as that of the minimal strategies. And this is summed up brutally by the order of the Court signed by all Justices (including Justice Khanna) which formulates the Court's opinion as denying "*any* locus standi to move *any* petition" on the ground that "the order is not under or in compliance with the Act or is illegal or is vitiated by *mala fides* factual or legal or is based on extraneous considerations" (p. 778).

The order is clearly at variance with the reasoning given by Justices Beg, Chandrachud, Bhagwati and Khanna. There was at least an agreement in these opinions on the point that a detention order could be challenged if it was not signed or if it was signed, but by an incompetent authority or stated a ground not authorized in terms by the Act. If one looks closely at the opinions of three Justices (Chandrachud, Bhagwati and Khanna, JJ.) additional though little wider grounds for maintainability of the petitions emerge. (We include in this count Justice Khanna because he should not be regarded as dissenting on those very points on which he agrees with his brethren: orthodox students of judicial process are welcome to frown at the 'liberty'!)

In a sense the order itself may be impugned as invalid or irregular, even though we may not go so far as to say that the "contradiction between the judgments and the final order is enough to invalidate the majority judgments" (Seervai, 1978: 13). The Supreme Court, it is clear, was *supremely* careless and reckless, so much so that it took away in about five sentences in the first paragraph of the order what hundreds of sentences in the five opinions granted to detenues. The first paragraph of the order is, compared with the opinions, wholly comprehensible and it is not surprising that everyone, including the detention administration, understood the simple message that the Court would just not interfere. This comprehensibility wrecked disastrous consequences, as has now been so tragically illustrated by reports of torture and death in detention.

The Supreme Court, speaking through Chief Justice Beg, later admitted that the order signed by all justices was "perhaps misleading as it gave the impression that no petition at all would lie either under Article 32 or 226 to assert the right of personal liberty because the *locus standi* of the citizen were suspended" [*In re Sham Lal*, (1978) 2 SCC 479 at 485]. Justice Beg went on to describe the majority conclusion in the order as inaccurate and "rather loosely and vaguely expressed". He conceded that it would be a "legitimate criticism" that "this Court should draft and state its majority conclusions better" (p. 486). Justice Beg also made it clear that had a "review petition been filed before us I would have certainly made clear" that the final order was inaccurate and misleading (p. 485).

This is an extraordinary statement from the Chief Justice of India, and a Justice who had participated in the momentous decision. A court which is entrusted with highest judicial power should at least avoid "misleading", "inaccurate", "loosely and vaguely expressed" formulations of its own orders. What is more, Justice Beg's remarks seem to suggest that justices of the Supreme Court, each of whom spoke highly of the values of liberty and the rule of law, signed the order without even reading it properly and that they afterwards proceeded with their *other* business, so oblivious were they of what they had

done! Not too long ago, a number of justices refused to sign what purported to be the summary of the majority view in *Kesavananda*, causing a great deal of problems in deciding what was ultimately held in that decision (*see* Baxi, 1974: 61-64). Justices Ray and Beg were among the four non-signatories to the 'summary' in *Kesavananda*: both were elevated to the highest judicial positions in due time. They were vigilant in *Kesavananda*, where what was involved was not signing of an order but merely authentication of what the majority opinion of thirteen justices was. What happened in a period of two years to make them less vigilant and even careless?

It is unnecessary to labour this point further excepting to add that the oversight of all justices as to what the Court was *as a whole* holding remains as incomprehensible as it was repressive at that time, and that Justice Beg's clarification raises more questions than it answers.

Obviously, the Bar was somewhat demoralized at the order. Only that can explain the lack of any review petition. Counsel also had fresh in their minds the manner in which the review petitions were actually handled in *Indira Gandhi*. Be that as it may, it is clear that the passivity of the Bar had carried high costs in terms of human well-being as is illustrated in *Union of India* v. *Bhanudas* [(1977) 1 SCC 834].

The second tragic aspect of *Shiv Kant* is that the majority held that even a *mala fide* detention order could not be impugned before the courts. It is true that the majority's inability or unwillingness to invalidate Section 16A(9) of the MISA was a factor that contributed to the result. But Seervai has rightly said that "this ground is untenable and should have shocked the conscience of any court". And he says "matters of which a court can take judicial notice may be sufficient to prove *mala fides*" (Id. 45). The three illustrations he gives are sufficient to prove this point.

The third tragic aspect of *Shiv Kant* is the lack of judiciousness conspicuously displayed in some of the majority opinions. Justice Beg's observation that "the care and concern

....bestowed upon the welfare of detenues who are well housed, well-fed, and well treated is almost maternal" is by now notorious (p. 643). But his wholehearted defence of the emergency is less known: he holds that the "current emergency" is justified "not only by the rapid improvements" in the "seriously dislocated national economy and discipline but also the grave dangers of tomorrow, apparent to those who have the eyes to see them, have been thus averted" (p. 643). He, therefore, holds that even assuming there are some supreme obligations or overriding powers or duties, vested in the superior courts the nature of the emergency, being so benign "could not possibly provide the occasion for the discharge of this obligation" (p. 643). Even as an example of judicial party-politics, Justice Beg's observations are inexpedient. The regime was not so uncertain of its powers and policies as to need or even expect any judicial endorsement of the imposition of the emergency, even by a senior justice of the Supreme Court. If anything, the regime desired the justices to keep *away* from politics. For, if one justice sings peans of praise, others, otherwise inclined, might begin to debunk the regime! In any case, judicial imprimatur on the emergency that the regime needed (and got) was *not* of the variety that Justice Beg's rhetoric provided but of a kind that the actual decision provided. What was needed was an assurance that the Court will not interfere with the political "progress" of the emergency policies and powers.

So that, in the result, judicial endorsement of the emergency was imprudent. Surely, Justice Beg would have known that at least one section of the senior bar was vocally against the emergency and that this section would not applaud his observations. Nor really would the other sections, howsoever committed to the values which the emergency, at one level, sought to serve; for, just no one was immune from arbitrary detention, except perhaps the Supreme Court Justices! Clearly, then Justice Beg could not have thought that he was endearing himself to the Bar or other consumers of law and justice; and no significant help to the regime was possible through such casual rhetoric. Nor did he think of the

institutional costs to the Supreme Court as a whole and to the judiciary in general.

Not merely were such observations uncalled for and unfounded but they tarnished the high dignity of the office and of the institution of the Court. Justice Beg overlooked the righteous indignation of the group of lawyers and public citizens when he, in the turbulent period as Chief Justice, wished to proceed in contempt against the denunciation of the *habeas corpus* decision. He was also to argue later that the Supreme Court justices were reduced in *Shiv Kant* to the position of being "soldiers without ammunition". In his case, at any rate, the problem turned out that he used the wrong kind of ammunition and the tactics of overkill. It is not necessary here to refer to the not dissimilar, though much less overt, observation of Chief Justice Ray. But, overall, the lack of judiciousness on the part of some senior justices of the Indian Supreme Court irreparably lowered the dignity of the court of last resort.

In conclusion, it has to be conceded that the great dissent of Justice Khanna illustrates all the pitfalls of the grandiose strategy of argument adopted by the learned counsel for the respondent. In substance, it has not been possible for Justice Khanna to establish cogently that the Presidential Order of 1975 could clearly be so construed as to provide substantial relief, beyond the minimum claims of legality, to the respondents. As we have seen, the distinctive aspect of his dissent is the leaving open and intact the High Court's writ jurisdiction even during the emergency.

But this has not been accomplished in an unexceptionable manner, particularly in terms of judicial craftsmanship. The emphasis on the rule of law argument, technically quite sophisticated, is however weakened by refusal to examine the validity of Section 16A(9). The arguments on the basis of international law have not been conclusively developed. Nor does the argument that there is a pre-existing right to life and personal liberty, meet the reasonable demand that this right be demonstrated as qualitatively different, and identifiably so, from the suspended Article 21.

On all these points, the "reasoned elaboration" in Justice Khanna's dissent is quite weak. Partly, the blame for this must be laid at counsel's doorstep: by conceding that the declaration of emergency was valid they foreclosed a fuller assertion of judicial spirit, at least on the part of Justice Khanna, Justice Bhagwati and perhaps even Justice Chandrachud. By their reticence to challenge any aspect of the then recent Constitution Amendment Acts (e. g. the finality of the satisfaction of the President, the insertion of the MISA in the Ninth Schedule) they unchannelled the task of the Court more or less away from any heroic assertions of judicial role in a juristic challenge to the regime of emergency. This was the strategy adopted despite the rather glorious performance by the Court in invalidating certain aspects of the Thirty Ninth Amendment in *Indira Nehru Gandhi*. In this sense, the strategy of arguments on behalf of the respondents has been dubbed "grandiose" rather than "grand". Obviously when they concede that the Proclamation of Emergency is valid and acquiesce in constitutional amendments, and the Attorney-General concedes that the Presidential Order cannot possibly be construed as a complete bar to judicial scrutiny, the Court's task becomes really very modest: almost comparable to a competition among amateur tightrope walkers. The Court is asked to define the limits within which people who are detained can move it for relief without violating the scheme of the Constitution, including that of the emergency provisions. It is at the very same time expected to provide maximum relief to detenues. Perhaps, if only the minimal strategy of argumentation was clearly pressed we might have seen much clearer and unanimous answers to the problem. This (alas!) was not to be.

A critic of Justice Khanna's dissent, and the underlying strategies of arguments adopted by the most distinguished counsel for respondents, runs the risk in the present atmosphere, still heavily surcharged with emotion, of being identified a supporter of the emergency. I most certainly run that risk in view of my qualified support of the Swaran Singh Committee's initial recommendations and despite my vehement public disagreement with the Forty-Second Amendment Bill as it ultimately emerged.

But a criticism of Justice Khanna's dissent, and of the underlying argumentative strategies, need not be an apologia for the emergency. The present critique is not in any case intended to be such. And it is consistent with high admiration for the nobility of purpose and moral integrity manifest in Justice Khanna's very *act* of dissent in those troubled days. Such a critique deserves, even in Indian intellectual ethos of today, an intellectual rebuttal and not political condemnation. The latter has only in rare situations (if at all), helped the cause of human rights and fundamental freedoms.

J. *BHANUDAS*: THE LAST NAIL IN THE COFFIN OF PERSONAL LIBERTY

The retrospective explanation given by Justice Beg in *In re Sham Lal* does not quite correspond to what he specifically held in *Union of India* v. *Bhanudas* [(1977) 1 SCC 834]. What was at issue there was not the legality of detention as such but the conditions of detention. Various High Courts had held that many such conditions were unauthorized by law and issued specific directions in relief (see the chart prepared by the Court in the Appendix). Even if it could be argued that the conditions of detention set out in the chart were not in themselves outrageous, the question was not one merely pertaining to those specific conditions but of the elementary *residual* rights of detenues. By its decision, the Court (Chief Justice Ray, Justices Beg and Jaswant Singh) *in effect* authorized the State to do what it pleased with detenues. What the State did with them in the event has now been tragically documented.

The detenues complained of violation of the Prisons Act, Jail Manuals and of specific conditions of detention legislations. They urged that they were entitled to the status of civil prisoners under the Prisons Act; that there was a recognized difference between *preventive* and *punitive* detention; that conditions of detention could be judicially examined even after the *habeas corpus* case; that the principles of legality and *ultra vires* are not abrogated during times of emergency for detenues and that Prisons Act applies to detenues where the conditions of detention prescribe jail as the habitat of a detenue.

The Court's response was a *total* denial of relief, and a *total* reversal of High Court decisions. Contrary to a large number of hopeful escapeways left open in the *habeas corpus* decision (notably by Justice Bhagwati) the Court held that "redressal of complaints against illegality or *ultra vires* or unreasonableness" in relation to conditions of detention could not simply be undertaken by it (pp. 855-56)! The Court accepted the contention of the Union of India that what is not *permitted* by conditions of detention legislation is *prohibited* by it, overlooking its own stance in *Prabhakar* where this plea was rejected by saying (and we repeat) that if this were to be accepted "it would mean that the detenue could be starved to death, if there was no provision providing for giving food to the detenue". Indeed, the Court reprimanded the High Courts for not overlooking *Prabhakar*! (AIR 1966 SC 424). Despite the categorical pronouncement (quoted here) the Court held that *Prabhakar* was an authority for the proposition that as a detenue is no longer a free man he can exercise "only such privileges as are conferred on him by the order of detention or by rules governing his detention"! (p. 859).

The Court accepted the further contention that to allow the detenue by judicial direction to be taken under police guard to the funeral or obsequies of a dead relation is "tantamount to the enforcing of his personal liberty"! (p. 849). As if this was *not* enough, the Court held that the State could distinguish, in times of emergency, detenues from ordinary prisoners and deprive the former of facilities and privileges available to the latter. A claim of parity of even a minimum kind between prisoners and detenues, was "totally misconceived", even if supported by the requirements of relevant statutes. Legality and *ultra vires*, the Court held, were *not* sacrosanct doctrines during emergency. What *was* sacrosanct was the "well recognized canon of construction" that the security of the State is of utmost importance in times of emergency and that in such context subordinate legislation has to be "*benevolently* construed" in favour of the State so that "the yardstick of reasonableness cannot be *appropriately* applied" (p. 856: emphasis added).

The Supreme Court even denied the detenues the status of

civil prisoners under the Prisons Act, conceded by the Bombay High Court. It conceded that a detenue is confined in jail as a measure of "administrative convenience" but that fact does not elevate detenues to the status of civil prisoners. The Court drew support for its conclusion from an early decision (*Maqbool Hussain* v. *State of Bombay*, AIR 1953 SC 325), but this was clearly erroneous, as in *Maqbool Hussain* the detenue was detained in jail under the Punjab Communist Detenues Rules, 1950, which was clearly "prescribed by the rules themselves". The Rules constituted a self-contained Code and the "provisions of the Prisons Act did not apply to them" (p. 332). The rules under review before the Court in 1976 did not provide specifically for detention in prisons, a decision which remained a matter of "administrative convenience". Nor did they wholly constitute a "self-contained code".

Justice Beg, in his concurring opinion, went even further. He felt that the well-established distinction between 'preventive' and 'punitive' detention, embodied in the Court's earlier decisions, was not easily or wholly acceptable. Preventive, like punitive, detention may have "therapeutic or reformative purposes behind them for the detaining authorities viewing the matters from administrative or psychological points of view"; indeed, judged from the standpoint of the detenue, preventive detention may "be not incorrectly described as 'punitive' ". Not fully satisfied with this judical fiat, His Lordship urged jurists to collaborate with the Court in substantiating the hypothesis of similarity between preventive *and* punitive detention! (p. 865). It is to the credit of law scholars as a class that no one engaged his energies in this task!

The only *prima facie* redeeming feature of *Bhanudas* is the final para in the opinion written by Justice Jaswant Singh (for himself and Ray, C.J.) where he suggests that to "eliminate chances of hardship" governments may issue standing orders to "meet special exigencies which necessitate expert medical aid being provided to the detenues . . . or their being removed temporarily from their places of detention on humanitarian grounds to enable them to perform obsequies of their kith and kin or for appearing in some examination without detriment to the

security of the State" (p. 860). The redeeming quality of this observation is quite deceptive, beçause the Court did not merely hold that the judiciary may not review conditions of detention, but further *declined* to lay down guidelines on how such requests by detenues could be met. The Solicitor General of India made this request to the Court. Justice Beg, in his concurring opinion, said: "*these are matters completely outside the scope of our judicial functions*" (p. 864: emphasis added). This observation, in the concurring opinion, clearly diminishes the force of what the two other justices had suggested (not even *urged*).

Indeed, Justice Beg who did not think it within the scope of judicial function to issue any guidelines on matters such as conditions of detention, undermined the Court's role even further by complimenting the State: the attitude of the State before the Court "has been very reasonable and proper". As if that was not enough, Justice Beg observed:

> Speaking for myself, I am inclined to suspect that a number of allegations made on behalf of detenues have the oblique motive of partisan vilification or political propaganda for which Courts are not proper places (p. 864).

The conclusion is inescapable that during the emergency (of the 1975-77 variety), courts are just not "proper places" for detenues to seek *any* redressal of grievances. The Supreme Court of India will not even look at legality or *ultra vires* of specific conditions of detention; it will give no relief; it will cancel any relief given by High Courts; it will also decline the request by the State to issue guidelines as to how specific problems of detenues should be dealt with. Given this kind of self-abrogation, the half-hearted suggestions concerning the need for evolving a uniform regime of conditions of detention or issuance of standing orders to meet certain exigencies, is (as it *was*) unlikely to be productive of any amelioration of tyrannical conditions of detenues during national emergencies.

We have dealt with *Bhanudas* at such length not just to show how far the Court, a custodian of *residuary* rights of detenues and prisoners, could go in transferring totally its

responsibility to the Executive. *Bhanudas* also represents a culmination of the Court's "can't help" attitude towards detenues and prisoners, the occasional flicker of a *Prabhakar* notwithstanding. In such a context, one is not surprized at the plight of prisoners and the impunity with which administration violates their rights and dignitary interests during peacetime as well as during emergency.

Lecture III

THE POST-EMERGENCY SUPREME COURT : A POPULISTIC QUEST FOR LEGITIMATION

A. THE RESURGENT SUPREME COURT: PROMISES AND PERILS

More than ever before in history, the Supreme Court found itself in the whirlpool of national politics after the emergency. The circumstances, arising out of March 1977 elections, were truly unique. People had voted into power for the first time, the coalition of opposition groups at the national level, reducing the age-old Congress Party to the role of opposition. And that party was to split up into pro-Indira and anti-Indira groups. The Congress, however, continued to have majority in the Rajya Sabha, a factor complicating legislative and constitutional initiatives bearing on the emergency changes in law and the Constitution.

During the election campaign, and in the first year of its administration, there was a euphoric atmosphere where every group in the society felt that a new dawn of justice was around. The Janata Party injected a massive amount of populism in national and State politics. The Prime Minister described people as God (*Janata Janardana*) and asked people at large to pull the government by its ears (as it were) if it strayed from the path : he certainly offered his own ears to be tweaked by *janata* if he went wrong. Every group in society began expecting miracles: but, of course, miracles just do not happen anymore (this being the Kali Yuga according to the Hindu cosmogyny) and the second year of Janata rule was marked by dejection and even, to some extent, by politics of cynicism and despair. The government and the Party, however, find themselves noticeably buoyant at the beginning of their third year in the direction of the national affairs.

It was the first year of Janata Government which brought

massive political problems to the Court. Within about four weeks of the Sixth General Election, the Court was called upon to do 'justice' between nine Congress governments threatened with President's rule and the Union government. A Congress Government Chief Minister, Devraj Urs, soon came to the Supreme Court asking it to invalidate the appointment of a Commission of Enquiry set up by the Union Government against his government and himself. Maneka Gandhi, wife of Sanjay Gandhi, moved the Court in relief from the order of the Government impounding her passport (dated July 2, 1977). The employees of the Life Insurance Corporation came to the Court protesting against the emergency legislative modification of the award of bonus under a settlement.

In the first year, the Court had also to decide on matters affecting the dignity and independence of the judiciary. It had to do something about the appeal on transfer of judges during the emergency which it ultimately decided in August-September 1977. Towards the end of the first year of the new government, (in Jan.-Feb. '78) there was public controversy over the appointment of the new Chief Justice. Chief Justice Beg valiantly seized this opportunity of clarifying the Court's role during the emergency, and his own, through long opinions in the infructuous contempt proceedings.

In the second year, beginning March 20, 1978, of the Janata Government, the Court was not any the less overloaded with political matters. The cases which aroused great public interest and focussed national attention were the *Sanjay Gandhi Bail* case and *Nandini Satpathy* case. Even more spectacular siphoning of the Court into the vortex of post-emergency politics occurred when the President referred the Special Courts Bill to the Court in its advisory jurisdiction. By sheer good fortune, the Court escaped a challenge to the expulsion of Mrs. Gandhi from Parliament on the ground of breach of privileges and vacation of her seat in Chikmagalur constituency where she had been returned to Parliament in a spectacular electoral fray.

But apart from the inevitable political content of some litigation, which gave the Court a new vitality, the Court as

a whole appeared determined to bury its emergency past by an astonishing range of judicial activism. It magnified some inherently ordinary cases into great constitutional controversies. If due process had died three early deaths—in the Constituent Assembly, in *Gopalan* and in *Shiv Kant* during the emergency—it was to be reborn in *Maneka*. Once reborn, justices decided on a vigorous breast-feeding of the new infant: they did not let a single occasion go by in which the due process interpretation of Article 21 could not be nurtured into a giant infant. Article 21 (bashed around quite a bit by the Executive and Courts in 1975-77) now began to become the soul of the Constitution. It was, to mix metaphors, also used as a kind of nuclear therapy for cancerous-looking growths in body politic and in administration of criminal justice. The Court, especially in Justice Krishna Iyer, began to apply this therapy to prisoners, a process which has recently terminated in a spectacular decision to release undertrial prisoners, who have languished in prisons for terms longer than those which can be awarded as sentence. The Court also vigorously sought extension of the legal services programme, and began reading the right to speedy trial in Article 21 conceptions of personal liberty.

Not merely this: the Court went out to help other groups. In the *L.I.C.* case, it gave workers the bonus cancelled by Parliamentary legislation in the emergency. It went further. In *Moti Ram*, it liberalized the law of bail. In *Bangalore Water Supply*, it redefined 'industry' in such a way that the Government had to, more or less, adopt its words in the proposed Industrial Relations Bill. The right to property was appropriately trimmed in *Ranganatha Reddy* and wide salience was given to Article 39(*b*) as to specifically sanction nationalization of resources.

In other words, if during the pre-emergency and emergency periods, the Court was relatively quiescent, in the wake of the Sixth General Elections the Court took an explosively activist stance. Within a few months of the new regime, the Court atoned for what it had to do or what it had done (I leave this to your interpretation) during the emergency. It

did this by widening the scope of judicial power in quite socially visible manner. It took magnificent initiatives, when it suspected that the Government was likely to drag its "feet" on matters like legal aid, prison reform, administration of criminal justice, and industrial relations.

This is important. What the post-emergency Court is really doing again, but in a vastly different manner, is to play a mildly oppositional role to the government in power. It is giving wide powers to the government to process emergency matters and in the sphere of social legislation. At the same time, it insists that the government *use* its powers for the ends of public good. And if the government appears quiescent, the Court nudges it publicly into action. If it still does not respond, the Court legislates openly offering the government too few comfortable options. The option of continuing State inaction on some matters would mean that the *Court's law* would prevail, for workers, prisoners, undertrials, indigents and other social groups, particularly the vulnerable ones. And one by one, governmental initiatives in law-making are being pre-empted by the Court, indeed to a point of parliamentary legislation in some matters being merely reduced to a pale and faint echo of the Court's leadership. The other option is to act: but the trouble here is that the government is unable to act as fast as the Court in some matters.

The Court, for once, is fairly cohesive; and in the Chief Justice of India, the Court has a leader which it did not have since 1973 in terms of acceptance by his colleagues on the Bench and Bar, and in terms of his own inherent dynamism. The Union Government, in contrast, continues to give the impression of a house divided. Moreover, perhaps, for the first time, the Chief Justice of India has a term nearly of eight years: a term of service to the nation not, on any present informed estimates, available to country's Prime Ministers and Deputy Prime Ministers.

An additional source of energy and dynamism is provided to the Court by its new appointments. Justices of outstanding

competence have now clustered on the Court; most of them have been elevated on their indisputable record of being "independent" (as against the executive) in the emergency. A Court like this is unlikely to be a passive agency of national government. If upon the retirement of Justices like Krishna Iyer, attempts are made to obtain his functional equivalents (for, who, alas, can ever replace Krishna Iyer!) on the Bench, the Court will continue to sustain its infectious activism. Already, we have in Justice D. A. Desai, an activist with a frankly 'socialistic' predisposition, which augurs well for the Court. The Court's craftsmanship, too, is on the whole going to be sustained; with Justices Chandrachud and Bhagwati to continue on the Bench till 1985-86 and with the induction of "younger" Justices like Justices Pathak, Chinnappa Reddy, A. P. Sen, and Venkataramiah. Some loss of "legalism" on the Court would be occasioned *by* the retirement of Justices Untwalia (1 August, 1980), Kailasam (12 September, 1980), Shinghal (15 November, 1980) and Sarkaria (16 January, 1981). But Justice Fazal Ali would continue on the Bench till nearly the end of 1985. There is every possibility that senior Justices of the Supreme Court and the Chief Justice of India would judiciously ensure in the new appointments a balance between craftsmanship and creativity, policy-oriented activism and hard-nosed legalism, role-models of judicial examplarship and reticence. And the pool of high judicial and juristic talent in the country, fortunately, is quite large.

All in all, therefore, the Supreme Court as a *group* in the coming decades promises a vigorous, ongoing constructive involvement in national affairs, which in the past decade arose more as a result of efforts of few individual justices than as a corporate activity of the Court. On the other hand, barring a few distinguished politician-statesmen, the Government has only second-generation politicians. The Court has no doubt too by and large second-generation Justices but through the discipline of the profession they are apt to show their superior talents over the politicians.

And it is here that lies the promise and danger. Already, signs of strain between the executive and judiciary are appear-

ing. The Law Minister was at one stage contemplating a review petition, urging a clarification of the directives on legal aid delivered in *Hoskot*; now, on correct second thoughts, he is to initiate a bill on legal services in the current session of Parliament. This was comparatively a minor development; but the tension already exists. In the reference on the Special Courts Bill, the Court specifically directed the Government to modify the provisions of the Bill; faced with a possible declaration of invalidity, the Government yielded. The now-pending challenge to the constitutionality of Ninth Schedule, and an invitation to the Court to declare the 1975-77 emergency invalid on the basis of Shah Commission's findings as well on the specific ground that economic recovery which Mrs. Gandhi urged in justification, has no nexus to Article 356 power, will tend to produce a diversity of judicial opinions which will continue to perplex the Government and Parliament (and even the Court in its future operations). And, as the emergency-excesses prosecutions continue, those in politics who have personally suffered, will be unsparing of the Court if its decisions appear to block the pursuit of legal nemesis.

It is the ineluctable destiny of the Supreme Court that before too long its actions will generate a multi-party consensus that the Court is going a bit too far; and that Parliamentary Sovereignty (whatever *that* may mean) is in danger. The Court is no stranger to this perennial problem; but this time round, the challenge to its increasingly hegemonial role in national affairs may pose acutely different problems.

But this is for the future. The present "glory of the infirm hour" belongs to the Court. As the Court goes about its tasks vigorously, it appears that underlying them is a search for new bases of legitimation of its own power. Broadly, the Court is seeking legitimacy from the people and in that sense (loosely) there are elements of populism in what it is now doing. We will be able to arrive at a more definite conclusion concerning the nature of its populism after we have traversed the last two years of the judicial landscape.

B. THE DISSOLUTION CASE: THE SUPREME COURT AT THE BAR OF POLITICS

The *Dissolution* case [(1977) 3 SCC 592] is a good example of a hard case producing bad law. But indeed it is an open question whether the case produced any law at all, bad or good. The situation was extraordinary and in a sense the national attention was focussed on the Court.

Within about three weeks of the formation of Janata Government, Charan Singh, the then Home Minister, issued a letter to Chief Ministers of nine States urging them that they advise the Governor to dissolve the State assemblies "in view of the unprecedented political situation arising out of the virtual rejection in the recent Lok Sabha elections, of candidates belonging to the ruling party in various States". The Minister felt that in the wake of massive electoral defeat a "climate of uncertainty" had arisen "causing grave concern to us". Three specific factors were mentioned. *First*, that "this has created a sense of diffidence at different levels of administration"; *second*, that "people at large do not any longer appreciate the propriety of continuance in power of a party which has been unmistakably rejected by the electorate" and *third*, that the "climate of uncertainty, diffidence and disrespect has already given rise to serious threats of law and order". A "fresh appeal to the political sovereign would" in the circumstances "not only be permissible but also necessary and obligatory". Charan Singh ended his letter by saying the Chief Minister's advice for dissolution "*alone would, in our considered view, be consistent with constitutional precedents and practises*" (emphasis added). This sentence, of considerable significance, was much ignored in the subsequent political action and litigation that followed as well as in the commentation on the Court's decision. I had the occasion of conducting a national television discussion on this issue, which turned out to be a real debate between opposed views, in which I focussed on this sentence and suggested that perhaps this was a case fit for invoking the advisory jurisdiction of the Supreme Court. As a result, some States urged the President to adopt this course. But the Union Law Minister's broadcast on the radio on April 22 gave rise to, or

rather reinforced, the feeling that Union might impose the President's Rule on the nine States. The nine Congress governments filed proceedings under Article 131 alleging a dispute between States and Union on April 25-26. And, on April 25, 1975, three members of the Punjab Legislative Assembly filed a writ petition claiming that their right to draw salaries as members of the Assembly, a right guaranteed as a fundamental right under the Indian Constitution, was in jeopardy. On April 29, the Court unanimously dismissed the petitions and the suits. On April 30, the President notified his taking over of the governments of the States and dissolution of the assemblies. The reasons for the decision were delivered on May 6.

In strict law, all that the Court was required to do in the case was to give reasons for its decision for dismissal of suits and petition on April 29. As of that date, the issues were: (*i*) Can the Court take cognizance of this "dispute" under Article 131 ? (*ii*) Can, and should the Court grant relief by way of injunction against the President on the alleged cause of action pleading that a specific exercise of Presidential power of dissolution was imminent? and (*iii*) Were the writ petitions raising the right to property maintainable? Given the fact that the suits before them were under Article 131, the Court should have explicitly formed these as issues. This was necessary under provisions of Part III of the Supreme Court Rules, in exercise of the original jurisdiction of the Court. The Court, as Chief Justice Beg specifically mentions, did not do this. The result is chaotic confusion as to what the Court has actually held on any of the three issues. The extent of this confusion in deciding what the Court has held has been ably demonstrated by Professors Rajiv Dhavan and Alice Jacob (1977: 355). There is not much point in my canvassing these matters afresh excepting to say that the Court decided not to be "hypertechnical" (a phrase quite current in the vocabulary of the post-emergency Court) in such matters. One might characterize this attitude, as my friends in their analysis do, as "flexible" or one might call it "undisciplined" or even political. One view of the law, even at the Supreme Court, and certainly in matters of first

impression, is that the rationale of the law as a check on arbitrary power lies in its "technicality". After all, lots of people were heard to say that Mrs. Gandhi's election was set aside on merely "technical" grounds by Justice Sinha; Mrs. Gandhi clearly thought and said so. The "technicality" of law is not just a restraint on the exercise of political power of the sister institutions of the government but also upon the Court in the exercise of its legislative and constituent power. In any case, it is clear that the Court as a whole wanted to say something concerning the situation and it proceeded to say it, however untidy its way of handling whatever it said may appear.

The situation was unusual, not just in political but also in legal terms. Article 356 no doubt empowered the President to impose the President's Rule on being satisfied upon a report of the Governor or otherwise that the government of the State cannot be carried on in accordance with the provisions of the Constitution. But the real question was: what was the ambit of this "otherwise" power? Was it unlimited? One would normally have thought that the word "otherwise" would cover situations where the breakdown of constitutional machinery was such that the President could take notice of it even in the absence of the Governor's report or that it provided a modality to deal with such a situation when the governors proved "recalcitrant or negligent in performing their constitutional obligation" to make such reports. In such situations the very grounds on which the President may form his "satisfaction" would be so obvious that a Court could properly take judicial notice of the same. But the Justices ducked the question in the manner of good opening batsmen ducking bouncers lest they might injure. Some of them also made a feeble appearance of trying to hook the bouncer even while ducking it: a stroke not quite possible in cricket but one not uncharacteristic in judicial sport.

They "duck-hooked" this argument by various incantations of the "political questions" doctrine, by suggesting that the Presidential satisfaction was binding upon the Court except where it was patently *ultra vires* or *mala fide*, by asserting that no materials were placed before them to even remotely suggest

either of these grounds, and by sundry related means (*see* Dhavan & Jacob, 1977). And yet "at the same time, some of the judges suggested that the exercise of power may have been justified". The Court engaged in what the lawyers "would call a lot of defensive policy declaration" at the expense of "constitutional interpretation of the width of Article 356" and of "analysis of finer points of the fact situation before them" (p. 386). Similarly, the claim of the petitioners concerning property rights "seems to have been neglected to some extent" in the "general hurried speed and the tension with which this case was publicized, heard and decided" (p. 389). Indeed, Justice Goswami parted with the case "with a cold shudder" at the possible impropriety involved in the Chief Justice's purported discussion of the pending matter with the Acting President and his requesting his brethren to expedite the delivery of judgments before the wedding reception of the Acting President's son. Chief Justice Beg thereupon issued a *press* statement explaining his position (*see* Baxi, 1978 : x).

Actually, the tension and hurry was for the Union executive. What remained with the Court was just confusion. The former arose from the fact that the Presidential elections were due and the State assemblies formed the electorate : "the Janata Party was keen to have a President of their choice elected. This perpetuated the political imbroglio" (Dhavan & Jacob, 1977 : 357). Having already given the order dismissing suits and petitions on April 29 there was no pressing need to immediately deliver the reasons, excepting for the fact that the Court was to proceed on summer vacation shortly. But a few more days would not have really mattered either way ; the reasons had no political significance as the Acting President had already acted soon upon the announcement of the Order. Not exactly soon, since the Acting President hesitated for a little while, causing a minor political storm. He must have had his difficulties because the Order of April 29 was unspeaking : how was he to be satisfied? In any case, the manner in which all this happened had some dignity-costs for the highest court in the country and its Chief Executive.

The real point about the dissolution case is that it was

altogether political. Dhavan and Jacob, who while conceding increasing political contents of Court's decision remain reluctant to formally recognize that the Court is a centre of political power, are content to say only that the case "had more than whisper of politics about it" (p. 357). "Whisper", whatever be its volume, is a masterpiece of understatement. There was the deafening sound of politics in the case ; and the result is also a lot of judicial sound. (This is why I reverse their title in my caption to this section and revert to original Bickel). One describes this result with the highest respect for the Court and its unenviable situation ; but the fact remains that we have here a set of decisions which is quite apt for a review application, given their long-term significance.

What is striking about the decision is the political, as distinct from the legal or juristic, content of it. We have here the first hint, in the post-emergency Court, of populism. By this I mean that the Court seeks a broadly "people-oriented" interpretation of the Constitution and also seeks to address, through its decision, the people of India at large. The message is clear and categorical : 'We care for you. We shall not let you down'. This is manifested in the manner in which the Court notices the political significance of the unprecedented election results.

Although Chief Justice Beg counsels as essential "growth of healthy conventions" on the matter of exercise of Article 356 power, he accepts in the present case the estimate of the Union Government that in this "critical juncture in the history of the whole nation", people in the States "must be given an opportunity of showing whether the party in power in the States should or should not pursue policies which may be at variance with those of the Union Government" (p. 628). He proceeds even to say that "it could not possibly be asserted that procuring the dissolution of a State Legislative Assembly, with the object of gaining a political victory is, in itself, an extraneous object which could not fall at all under Article 356 of the Constitution" (p. 629). Justice Chandrachud had no hesitation in saying that the Court must intervene if it finds

that a constitutional power "meant to be exercised for preserving democracy is used for destroying it". He held that the "Home Minister's letter is clearly and indubitably on the safe side of the line" (p. 645). He had in his *Indira Gandhi* opinion, as we saw earlier, taken the position that "democracy" is in any case not "destroyed" easily by removal of any vital element of it from our notions of it. So that Justice Chandrachud was only being consistent with himself: most exercises of executive, legislative and constituent power will, given his approach to "democracy", fall indubitably and clearly on the "safe side of the line" between its preservation and destruction. In any case, the defence of democracy is necessary, in the last analysis, for the people. The "people for whom the Constitution is meant" he says "should not turn their faces away from it in disillusionment for fear that justice is a will-o'-the-wisp" (p. 646).

Justice Fazal Ali, in an otherwise reticent opinion, clearly feels that the inference drawn by the Home Minister that the governments in States had lost the confidence of the people of States is a reasonable one and also has nexus with "action proposed to be taken under Article 356 for dissolution of the assemblies" (p. 692). This is so because the March elections constituted a verdict on the "policies and ideologies followed by the Congress governments as a whole whether at the Centre or in the States during the twenty months preceding the elections" (p. 692). Justice Bhagwati is even more explicit. He finds that after the March elections "there is a wall of estrangement which divides the government (in the States) from the people" and "there is resentment and antipathy in the hearts of the people". Consent, which is the basis of the government, had been withdrawn "so entirely and unequivocally as to leave no room for doubt about the intensity of public feeling against the ruling party" as to seriously undermine the "moral authority" of the governments of nine States. Consequences of "conflict and confrontation may develop between the people and the government leading to collapse of the administration". He holds that after the massive defeat of the ruling party "the Legislative Assembly of the State(s) has ceased to reflect the

will of the people and there is complete alienation between the Legislative Assembly and the people. This factor cannot be said to be "wholly extraneous or irrelevant to the purpose of Article 356" (p. 665). Justice Goswami also, despite the overall brevity of his opinion, "hastens to add" that the grounds given in the Home Minister's letter "cannot by any strength of imagination be held *mala fide*, extraneous or irrelevant" (p. 670).

Indeed, these observations contain more than any government could have hoped for. Charan Singh's letter to the Chief Ministers indicated that the government was not quite clear in its mind whether Article 356 power could be at all used in the situation: that is why he requested them to advise their Governors to dissolve the assemblies. He added a very significant statement: "This *alone*, in our considered view, be consistent with constitutional precedents and democratic practices". In other words, the imposition of the Presidential Rule was not thought so consistent. The observations quoted from various opinions would, however, have reassured him. Voluntary dissolution was, the Court in effect said, not the only means "consistent with constitutional precedents and democratic practices": a Presidential dissolution was equally so.

The dissolution case, it should be clear, is a political judgment and it should be frankly recognized as such. And when I say that it is a political judgment, this would be considered derogatory only by people who hold a "nursery" or "kindergarten" view of the judicial process. I do not see any objection in Justices of the Supreme Court taking account of hard political facts and discharging what they, in their conscience, feel to be their constitutional responsibilities in their role as the top adjudicators of the nation. I put it to the critics of the Court that they would not have done otherwise if they were in the judgment seat. The choice was clear in a nation which had democratically seen its way out of an authoritarian regime. Either you help it or you hinder it: there was no middle ground.

If you helped it, you ran the risk of being called a

Janata Judge; if you hindered it, you ran the risk of being called an Indira Judge. I think the Justices have done commendably well in avoiding the dilemma by being neither and assuming the role of being people's justices. And, they ran a risk in deciding as they did. For, there was no way of knowing that Congress may not be returned to some, even one, State or may lose by a narrow margin.

We may say that Justices of the Court may be slightly more careful in giving vent to their feelings because their words endure in an otherwise changeful world, that they avoid metaphysical exuberance ("alienation", "will of the people", "defence of democracy" and so on) which, perhaps, belongs more properly to the realm of extra-judicial rather than judicial discourse. But this is only a matter of style, of expression and craftsmanship; and there are no universal truths about these either.

The only question is: was it good politics? The answer here is somewhat complex, though basically in the affirmative. The complexity arises because the law had to take a back seat. And this deprives the Court of its mystique and creates long term problems of legitimacy and accountability in its wielding of political power. Hence, attempts were made to leave small windows of law open while tentatively closing the door. The Court did not decide whether there was a clear jurisdiction in matters like these: some Justices said there was and others said there was not. The Court did not say finally that it would automatically validate all exercises of Article 356 power in the future. It looks as if it may insist on a reasonable nexus between external events and Presidential satisfaction. The range of facts of which the Court may take judicial notice is much wider than it ever was in the history of the Indian judicial process. On "political" questions there was a reasonable amount of equivocation.

Undeterred by the lack of time and abundance of tension and noise, Chief Justice Beg went on, somewhat merrily, to add new twists to the doctrine of basic structure raising pregnant possibilities. (He even raised the possibility whether the basic

structure doctrine could be justifiably used to exercise Article 356 power!) He wondered aloud whether Directive Principles were also a part of the basic structure but soon ran aground with numerous problems this would raise. Narrowing down, in a rather wide manner, his own observations in *Indira Gandhi* he swiftly and tantalizingly reached the conclusion that if "executive policy which could fairly appear to be a clear deviation from what the basic structure requires" we could strike it down! In this, he was deliciously oblivious to the holding in *Kesavananda* and *Indira Gandhi* that the doctrine of implied limitation does not apply even to legislative power; he was blithely to reiterate this very notion in *Karnataka* case. Justice Beg did this, quite understandably, as he did not in his remaining term expect to have many opportunities to further clarify the doctrine. Why he should have wanted such opportunities is clearly an impertinent question.

But if we disregard the free ride on the basic structure, it is clear that the Court was not altogether unmindful of States' interests. It even made the charming suggestion that "healthy conventions" should be developed precisely in an area in which history so far has demonstrated the impossibility of such a development. But the suggestion coming from such high quarters should be grist to the mill of demand for States' rights.

So, all in all, it was good politics. After all, the Court was not ostensibly anxious to enter the political fray. The Court's decisional history should have warned, if not the exceptional political situation, that its overall sympathies lie in favour of a strong Centre. The Court is, in effect, telling the States that it is bad politics on their part to seek to involve the Court, one month after the historic general elections and in the face of imminent Presidential elections, in a novel reading of Article 356. This simply was not good politics. Anyway, it interfered rather badly with the Court's own search for legitimation in the wake of strong, even if somewhat ill-understood and ill-justified, criticism of its decisions during the emergency. From the point of view of its own legitimacy, the decision in the dissolution case was definitely good politics.

But if you still want to believe that these matters are irrelevant and the Court gave its decision in accordance with the law as it saw it, I must confess that I must have gone terribly wrong somewhere in my thinking.

C. COMMISSIONS OF ENQUIRY: POLITICAL WARFARE AND JUDICIAL ROLE MODELS

Another major controversy of indubitable political significance emerged soon after the *Rajasthan* case when the Union Government appointed a Commission of Enquiry against the Karnataka Congress (I) Chief Minister, Devraj Urs. The Commission was appointed under Section 3 of the Commissions of Enquiry Act.

Section 3 of the Act authorizes the appropriate government (Union or State) to "appoint a commission of inquiry" for the purpose of "an enquiry into any definite matter of public importance". There is, however, a proviso which in terms prescribes that if the Central Government has appointed a commission, a State shall not appoint a commission to "inquire into the *same matter*" so long as the Central Commission is functioning. Similarly under the proviso the Central Government is also prohibited from appointing "another commission to inquire into the *same matter* for so long as the commission appointed by the State Government is functioning" except when the Central Government "is of opinion that the scope of the inquiry should be extended to two or more States". The commissions under the Act have wide powers of fact-finding; they are functionally equivalent to courts, in some matters, for this purpose. But in no case are they adjudicatory bodies. Their task is done with the finding of facts on issues referred to them. As has happened in the past, no further action may be taken by governments on the findings of the commission.

One simple question in the *Karnataka* case was whether the Central Government could appoint a commission of enquiry (which it did on May 23, 1977) against Devraj Urs and his colleagues on the State Cabinet when the latter had already appointed a commission to enquire into allegations of corruption (on May 17, 1977). The Union Government argued that

it can do so since the bar of Section 3 applied only if its commission was to enquire into "the same matter" as the State Commission. On behalf of the Chief Minister, it was argued that the subject-matter of the Central Commission was substantially the same. The terms of reference of the commissions were before the Court.

Although this was the legal form of the question, in the shape of a preliminary objection, the political bases of it were specifically stated and deserve to be noted for any grasp of of the case. This was the *first* case in which "the Central Government had ordered an inquiry into abuse of powers by a Chief Minister in office" (p. 747: *per* Kailasam, J.). *Second*, the terms of reference of the Central Commission were based on allegations made in a memorandum dated April 11, 1977 received from opposition members and addressed to the Prime Minister. *Third*, the Urs Ministry was functioning since 1972 and the then Central Government had declined to constitute a commission despite several allegations. *Fourth*, in the Sixth General Elections, the Congress led by Urs won 26 out of 28 Parliamentary seats defeating the Janata Party. *Fifth*, the Chief Minister had in his correspondence on the subject with the Union Home Minister specifically denied the allegations and raised a large number of constitutional points against any possible enquiry being initiated against a democratically elected government in *office* in one of the States (*see* pp. 626-27). *Sixth*, although the Chief Minister had denounced the allegations as "slanderous propaganda" made with a view to "tarnish the image of Congress Party" and the government in the State, the Karnataka government appointed a commission on May 18, 1977 "in order to allay any suspicion in the minds of the public in the State, and in view of continued agitation for a judicial probe, and in accordance with the highest and best traditions of government" (p. 627). *Seventh*, despite this the Union Government appointed its own commission, in a manner which complied with Section 3 of the Act—that is, by strictly excluding from its purview those matters which fell to be investigated by the State Commission.

Obviously, both the State and Union Governments were involved in a big battle for political power in the State. Naturally, both used law as a tactic in this battle of power. Devraj Urs sought to make a pre-emptive legal strike: if he appointed the commission *first,* his legal advisers must have told him, the Central Government will be disabled from appointing a commission. The Union Government also retaliated: on legal advice, it only accepted Section 3 as saying: 'You shall not appoint a commission to investigate the same matter which a State Commission is investigating'. The Urs Ministry appointed a retired High Court judge; the Union Government appointed Justice Grover, a retired Supreme Court Justice (who had, incidentally, resigned because of supersession in 1973).

If one looks at the matter from the point of view of constitutional proprieties, two questions at least arise. One is the propriety of the action of the Central Government; and the other is the propriety of Justice Grover's acceptance of the assignment. On the first matter, a long term perspective might suggest that when the Union Government received the objections from the State Government based on many aspects of Centre-State relations, followed by notice of appointment of the State Commission, it should have sought the advisory opinion of the Supreme Court. For, what was involved here were complex questions of Federal-State relations, more so since this was the very first occasion on which, as noted, the Union Government was commissioning an enquiry into an incumbent State Government. Also there had never before existed the situation of two commissions appointed—during the incumbency of a State Government—to enquire into the doings of the Chief Minister and his Cabinet colleagues. Constitutional propriety and statesmanship demanded clarification of vital legal issues through the advisory jurisdiction, which would have had the benefit of participation by other States. The expectation that the new government would chart out a different path than its predecessors in the area of Centre-State relations could also have been better served by such a course. An advisory proceeding might also have given the Court a more broad-based jurisdiction to consider the matter on the basic constitutional perspective. Of course, there was the probability of the Court's rendering advice which may further complicate the situation for the executive. But this was a prospect not to be lightly dismissed either in a litigation initiated by the State concerned. The Court was to get involved in any case in the latter situation.

The second question is a more general one regarding the involvement of sitting or retired Supreme Court justices in Central commissions of enquiry. With all great respect, the question of the propriety of a sitting Supreme Court justice's involvement in an enquiry commission has to be sharply raised. The public interest served in an exposure of political corruption is undoubtedly great and distinguished sitting justices bring a degree of detachment and, therefore, social and political acceptability to such enquiries. But the question is: are these interests really served by their association with the commissions of enquiry? And are the symbolic and real costs to judicial independence of the judiciary entailed in this exercise really worth incurring? Let it be plain that the Act does not make commissions any more than fact-finding bodies; this task of fact-finding is really associated in our legal system with the subordinate judiciary. But the subordinate judiciary has adjudicatory powers; the commissions under the Act do not have these either. Ultimately, these are only intelligence gathering bodies who submit a public report to the appropriate government; there is no assurance that any action would follow. In fact, legal action on the reports of commissions of enquiry is not a rule but an exception. When, therefore, the sitting justices of the Supreme Court begin to head commissions of enquiry, which not merely cuts into their precious judicial tenure on the highest Court, but which have in reality no more significance than that of mere fact-finding, they weaken their own role as adjudicators of legality in the nation. The notion of independent judiciary is also exposed to grave strain when sitting justices of the Supreme Court (and also High Courts) associate themselves with commissions which are established often not on any grounds of propriety or principle, nor any well thought out course of policy to eliminate systemati-

cally the abuse of power, but merely on grounds of political expediency and gain or political necessity. There is a further difficulty in their association with such enquiries if legal wrangles arise in the course of enquiry and matters are taken to High Courts or the Supreme Court. Adjudging the legality of acts of brother justices working on commissions of enquiry presents complex problems of human and institutional relations.

Much of the same considerations apply to retired Justices of the Supreme Court. The Fourteenth Report of the Law Commission of India found it necessary even in 1956 to urge that retired justices ought to avoid any assignment with the government; the discussion on supersession of judges in 1973 also highlighted the need for some wise norms in this matter. In this particular instance, the Central Government requested Justice Grover, and he accepted its request. But the Chief Minister of Karnataka in his letter to the Union Home Minister had invoked the proposition that federalism is an aspect of the basic structure of the Constitution. Justice Grover had joined Justice Shelat in an opinion which in terms held that the "*secular* and *federal* character of the Constitution" was an aspect of the basic structure (*Kesavananda*: p. 454). The Chief Minister maintained, and was to argue later in court, that Section 3 of the Act under which the Grover Commission was appointed was violative of basic structure, and accordingly *ultra vires*. If the Central Government felt that Justice Grover should undertake the enquiry, it should have, for that reason as well resorted to advisory jurisdiction on these and related aspects with a view to prevent any embarrassment to the learned justice.

Justice Grover ought to have, in my opinion, made this a pre-condition of his acceptance. He did not. The Supreme Court in the event was asked by the State to declare the section invalid on the plea of basic structure relying, *inter alia*, on Justice Grover's position. It did not. The result is that a senior Justice of the Supreme Court, who would have (but for 'supersession') in turn adorned the Chief Justiceship of India, got involved in a repudiation by the Court of one of his own major contributions to constitutional law and jurisprudence in

India. Such situations, in my opinion, should just not be allowed to arise when alternative courses of political action are open. They create erroneous and misleading impressions in the public mind that eminent Justices of the Supreme Court do not pay regard to their own counsel upon their own retirement as to limitations and proprieties of exercise of State power. To the extent that people absorb such impressions, the belief in the dividing line between a judge and a politician weakens. That dividing line is that in politics adherence to principle is relevant to political power only when it is expedient whereas for judges, so the common belief runs, adherence to principle is the supreme norm and considerations of expediency have (or ought to have) only, if at all, a marginal role.

Of course, a judge upon retirement is only a private citizen. But the moment we say this, the whole basis of selecting retired judges—particularly of the Supreme Court—weakens to the point of disappearance. Eminent lawyers, parliamentarians, public citizens, educationists, journalists, retired Governors (to mention only a few) can equally be assigned such enquiries. The very reason for appointing justices is that by outlook and experience, they have a judicious temperament; that they, more than any other social group, have long training in the art of balancing social interests underlying conflicting legal claims and a role-model which stresses fairness, dignity and wisdom. That is the reason why governments are prone to appoint, and people apt to demand, judicial enquiries in controversial matters. Retired justices who accept commissions therefore share the heavy responsibility of maintaining the complex standards of rectitude distinctive to their role in national affairs.

D. WHEN IS THE "SAME MATTER" NOT QUITE THE SAME?

Be that as it may, let us revert to the principal preliminary objection. This was that as the State Government has appointed a commission, there was no power under the Act for appointment of another commission. The Union answered this by saying that the areas of the Grover Commission covered different matters and if there was an overlap the enquiry was to

avoid looking into the same matter falling within the jurisdiction of the State Commission. The majority accepted the contention on behalf of the Union, with Justice Kailasam filing a dissent.

Before we engage ourselves in any examination of rival arguments, a preliminary point needs to be made. And this is that it is becoming increasingly difficult to ascertain not merely what the Court ultimately holds (this may be said to be understandable) but also difficult to understand whether a particular matter was considered fully in oral hearings as a specific issue. This makes the task of understanding Supreme Court decisions very problematic and betokens a state of affairs not wholly worthy of the highest court in the country. We have already seen one example in *Indira Gandhi*. The present case offers another major illustration of this unwarranted tendency.

In the memorials filed by the State, the terms of reference for both commissions were appended. Obviously, arguments were heard on both sides (p. 627 : *per* Beg, J.). The Court too considered the matter to be a threshold matter. But the three issues framed by the Court do not specifically deal with the question whether the Central and State Commissions relate to the "same matter" so as to bar enquiry under the proviso. Chief Justice Beg concedes that such an issue was *not* framed; having conceded this, he proceeds to formulate *this* issue in his judgment! Justice Chandrachud, who deals with the problem, does not worry much either as to whether the matter had to be specifically pleaded as an issue. Neither does Justice Untwalia (for himself and for Justices Shinghal and Jaswant Singh). In contrast, Justice Kailasam states that "we were not called upon to go into the two notifications and determine which item in the notification is not covered by the State Government notification" (p. 749). The position is further complicated by the fact that Chief Justice Beg ends his rejection of the objection by the State by saying:

> We however leave it to the Grover Commission itself to determine. . .whether a particular matter is already being properly enquired into by the State Commission (p. 640).

Surely, the question before the Court must have been whether the two notifications relate to the "same matter": if they do, the Grover Commission could not be *constituted* in the first place, since the State Commission was established already. On this very point, it is not right to say that the Grover Commission should, if it finds a particular matter to be the "same matter", respect the State Commission. If the matter of enquiry for the two commissions was *not* the *same*, the Grover Commission, logically, should have no occasion *at all* to decide whether it should yield to the State Commission, as the terms of its reference *and* the majority opinions do ultimately also suggest. It is at any rate intolerably unclear as to whether the Court was asked "to go into two notifications" to decide whether they were related to the "same matter" within the ambit of Sections 3 (1), proviso (*b*). Who is a student of the Court to believe as to what actually was pleaded before the Court or was done by Justices in considering this question: the Chief Justice and his colleagues or Justice Kailasam? Please note that the question here is not as yet of policy—whether the Court should have taken a liberal or strict view in dealing with an issue which was not specifically framed. The question is one of fact, namely whether the Court was asked and whether it did as a matter of fact undertake a term by term, or clause by clause, examination of each charge before both commissions with a view to find out whether the matter for enquiry was the *same* or different. Quite frankly, lack of clarity on this aspect is unbecoming to the Court of last resort. Students of Court should be liberated by a more painstaking craftsmanship, incumbent upon Justices of the Supreme Court, from the rather unrewarding, and occasionally tedious job of finding out answers to the elementary question: was a particular matter at issue or not?

Let us look at the specific reasons given by the majority for negativing the contention of the State. Both Justices Beg and Chandrachud take the view that the State enquiry pertains to different matters from the Union enquiry since the latter is specifically focussed on the allegations against the Chief Minister by name, whereas the former directs the enquiry to find out "who are the persons responsible for the lapses, if any, regard-

ing" the 31 allegations there specified and the extent of the lapse (p. 632). Chief Justice Beg says that the object of the Union enquiry is wider: its object is "to affix responsibility for transactions . . . on individuals who may be really guilty", whereas the object of the State notification is to merely ascertain lapses "as though one could assume that there was no dishonest motive". By this he means that even where a transaction "has been made completely in accordance with the rules, it may, nevertheless, be an act of favouritism tainted with corruption or dishonesty". (I find this pronouncement typically incomprehensible.) Anyway, Chief Justice Beg, therefore, unhesitatingly concludes that the State Commission is to find out whether "the veil worn by certain transactions is correct in form", the Union Commission is required to pierce that veil, and discover "the reality or substance . . . behind certain transactions" (p. 638). In his own felicitous words, the State Commission "is meant only to superficially scratch the surface of allegations made" the Central Commission is meant to "probe into the crux or the heart" of what might or might not have gone wrong "with the body politic of Karnataka" (p. 639).

How did the distinguished Chief Justice of India come to this conclusion? He says "*obviously*" the subject-matter of the two enquiries "could not really" be the *same* (p. 639). Obviously, because surface-scratching is not the same as probing into "crux or heart". But how does his Lordship reach the conclusion concerning the superficiality of the State Commission? The answer that a "bare reading of the two notifications . . . shows that" is unsatisfactory. A "bare reading" did not show to Justice Kailasam what it showed to Justice Beg. The "bare reading" only shows that the Central enquiry mentions by name the Chief Minister (and others) whereas the State notification casts the net *wider* to include all persons.

Does anything turn on this difference in objects? Please recall that proviso (*b*) of Section 3 (1) of the Act does not bar enquiry by both Centre and State with the same *object*. Rather it bars the Central Commission from investigating the same *matter* as the State Commission. Nothing turns on the language

of the Act, on the question whether the object is specific or general, superficial or profound: the Act, we repeat, does not speak of *objects* of enquiry when it defines the *powers* of Union and State to appoint commissions excepting to require that they relate to "definite matters of public importance". The relevant proviso does not refer, therefore, to the question whether the power is limited to lapses or guilt or motivation underlying lapses. The one and only question is: are the *matters* covered by the two commissions the *same*?

That Justice Beg misreads the statute is further clarified when we look at an astonishing passage in his opinion. He says that "we cannot view allegations of corruption lightly". From there he proceeds to refer to Directive Principles, which contain or are related to basic rights of the people. If these basic rights are

> not [illegible] stultified and to appear chimerical, those in charge of the affairs of the State, at the highest levels, must be above suspicion. This is only possible if their own bona fides and utterly unquestionable integrity are assured and apparent in the context of the high purposes of our Constitution and the dire needs of our poverty stricken masses (p. 639).

Therefore, says Justice Beg, the "interests of the State and the Union are not antithetical when there are charges of corruption and misuse of power against those in authority anywhere" and the States and the Union must "stand together united in purpose and action". Justice Beg, accordingly, counsels that "we could not be *too technical* or *astute* in finding reasons to hold that the subject-matter of the two enquiries is substantially the same" (p. 639: emphasis added).

This in principle is a good approach. But corruption or suspicion of corruption in the body politic may be the justification of the power to institute enquiries under the Act. The Act has to lay down the manner of the *exercise* of that power. Since both the Union and States have the power to appoint commissions or enquiries, the Act had to deal necessarily with possible conflicts between exercise of this power by the State

and the Union. That is why proviso (*a*) debarred States from setting up commissions to inquire into the same matter as the Central Government appointed commission and proviso (*b*) reversed the bar to the Union Government when the State had already appointed its commission (*see* pp. 747-48: *per* Kailasam, J.). Parliament sought to remove the possible conflict by obligating both States and the Union from not appointing commissions in relation to same subject-matter. Instead of *nurturing* the delicate balance thus struck by Parliament and of carefully examining whether the Grover Commission deals with the same subject-matter, Justice Beg simply asks us to avoid "too technical" an interpretation. May one ask: what is technical about the demand that the terms of reference of two commissions be carefully compared before the conclusion is reached that they do or do not deal with the same subject-matter?

E. "POLITICAL REALITIES" AND JUDICIAL PROCESS

The Court is more anxious than Parliament to give liberal power of instituting enquiries to the Union Government. Justice Chandrachud too, in an otherwise cogent-looking opinion, is moved to say that the argument that two notifications "cover the same matter suffers from a lack of recognition of ordinary political realities". He says this because a State cannot appoint a commission of enquiry without the concurrence of the Chief Minister and the latter cannot be expected to concur with a proposal to hold an enquiry against himself. If he has to decide to do so, obviously the "political climate is so hostile" as to make his continuance in office, and that of his cabinet, improbable. It is more likely, Justice Chandrachud says, that he "will quit" rather than "be obliged to submit to an enquiry into his conduct". If the Council of Ministers think that some charges against their Chief or themselves need to be investigated "they would have forfeited the confidence of the legislature and would ordinarily have to tender... resignation". Thus, he concludes that

> the objection of the State Government that the notification... offends against clause (*b*) of the proviso... of the Act is *factually unfounded and theoretically unsound* (p. 694: emphasis added).

To say that the contention is "factually unfounded" is, however, unsupported by any patient and searching examination of the similarities and differences in the substance of allegation in the two enquiries. The Court merely looks at the object of the enquiry, which is not what the statute authorizes. Much of what we have said concerning the "object" test also applies here.

As to "political realities", all of us tend to be a little dogmatic now and then and justices of the Supreme Court are no exception. Surely, the appointment of an enquiry against himself by a Chief Minister is not inconceivable though it may be unlikely. Indeed, in this very case the Chief Minister appointed a commission which might even find that he had committed some "lapses", unless we are to presume that no State Commission can find a Chief Minister guilty, even of "lapses". To say that the State Commission was not appointed in the "hostile political climate" would also be somewhat inappropriate in the present context.

The capital point seems to be that as compared with the State, the Union Government may find it possible to appoint commissions of enquiry against the Chief Ministers and cabinet colleagues in a State. But this is, ultimately, a partial analysis of "political realities". To complete it, it would also have to be said that such enquiries are not likely to be appointed unless the government in the relevant State is run by opposition parties. There is as yet no example of a ruling party at the Centre—be it Congress or Janata—having appointed a Central Commission to enquire into nepotism and abuse of power by its own ministries in office in States, despite the rather substantial *prima facie* evidence against them available from time to time. Nor, as the recent events show, is the Union Government likely to readily appoint commissions of enquiry against its own cabinet members. In other words, recognition of "political realities" must compel some recognition of the fact that the power of instituting enquiries is primarily a weapon in the otherwise already rich armoury of Indian politics.

Thus, the scenario projected by Justice Chandrachud does not adequately reflect political realities. It also overemphasizes the significance of the very act of setting up commissions of enquiry. For, in the nature of things nothing much of immediate significance happens when a commission is appointed. Day to day hearings are held, witnesses examined and some minor publicity ensues. If the party has faith in its leadership, and the opposition is not overly effective, the Chief Minister and his cabinet continue functioning. This is particularly the case when the government in the State is of a different political complexion than that in the Union. Indeed, if anything, the act of appointing the commission mutes sharp attacks by opposition and media on personalities and policies involved: those who wanted an enquiry have been given it! The commission may take its own time and its ultimate results may be quite mixed, given the assorted nature of allegations. The findings of the commission may not be assured of any immediate legal action. It is only when the findings result in serious reflection on the conduct of people involved that one can expect the process of resignations and changes in the leadership or the government. [Even this is not certain, as events (as we go to press) have shown. The Grover Commission's report had to be sent to the State Government for necessary action. The State Government's notions of 'necessary' action may diverge from that of the Central Government, and also from that of ordinary people—including, in this latter category, the justices of the Supreme Court.] Many other scenarios could be depicted. The simple point is that Justice Chandrachud's reliance on "political realities" to negative the contention of the State may itself not be "theoretically" sound.

In any case, the exaggerated emphasis on allegations against a Chief Minister as providing the vital difference between the two commissions is not self-evidentially borne out by the terms of the legislation. All that is required for constituting an enquiry is that the subject-matter be one "of definite public importance". But concurrent enquiries on the *same* matters of public importance are ruled out by the Act. The question as to who committed the alleged acts, or whether the people who

committed them are in power, is by itself unrelated to the power to appoint commissions. As Justice Kailasam points out, the Act is an authority for enquiring into matters of public importance and the "conduct of a person" is only incidental to the "enquiry into definite matter of public importance". The enquiries are, accordingly, not enquiries into the conduct of any person as such but into matters which relate to high public importance: only this approach, Justice Kailasam says, would render sensible Section 8B of the Act inserted in 1971.

Justices Beg and Chandrachud do not specifically meet this argument. They prefer to look at the object and the target of the enquiry, rather than at the question whether the matters enquired into were the same. This construction solves for them the problem of having to examine, in detail, whether the two notifications traversed the "same matter".

The majority decision thus illustrates the trend not to question the political decisions of the Union Government particularly when a liberal construction of the legislative power enables the Court so to do. In this case, the liberal construction is also sustained by the concern for pure public life in Chief Justice Beg's opinion and with "political realities" in Justice Chandrachud's. These, according to conventional legal wisdom, are extra-legal factors. Such factors can be invoked only in aid of a careful analysis of problems associated with rival interpretations of a statutory text; but not as major premises for arriving at the conclusion that the uses of political power are beyond question, regardless of the statute. This seems to be Justice Kailasam's message to the majority. He too is concerned with purity in public life. But he urges courses of action which are principled rather than merely expedient. He feels that if purity in public life is difficult of attainment through the exercise of the powers under the Act, consistent with even a minimal respect for values of federalism, Parliament could surely find other ways, like the creation of an Ombudsman. The appointment of a Lok Pal, he says, will be a step in "the right direction, if sufficient constitutional safeguards are provided for the institution" (p. 752).

The anxiety to validate the Karnataka enquiry in the interests of a pure public life is understandable and even laudable to a point. But an occasion like the present was only a historical aberration as commissions against Chief Ministers in power belonging to the same party which holds power at the Centre are unlikely. So that in the final analysis what was involved here was the politics of today and not of tomorrow.

But how can the Supreme Court avoid the politics of today? If the Court had held otherwise than it did, the only alternative for the Union would have been to amend the relevant law. Such a move would not have been an easy process, given substantial opposition in Parliament. If, however, the legislation got amended, the Court, in the process, would have been exposed to heavy political criticism for obstructing, by a "technical interpretation" of the law, the ruling party's pledge to do something about political corruption. Its "hypertechnical" construction would have annoyed not just some politicians but also *freelance* "jurists". And this would not be the best thing to happen to a Court, particularly so soon after the Sixth General Elections. Justices would have been attributed an undoubted political bias by their opponents and critics of the Court, at the very time when they were very sensitive to public criticism.

The Court did not direct itself, in the circumstances, to the politics of the future, in the sense that it did not direct that political action should scrupulously adhere to reasonable limits set by legal rules. Nor did it project, with the exception of Justice Kailasam, any institutional innovations or changes for dealing with corruption in public life in the future. All it did was to accommodate the assertion of power by the Union over the claims of the State. And this it did, as we saw, by an expansive interpretation of the law, guided by the value of purity in public life. But this accommodation had the effect of adding fuel to the fire of demand for State autonomy and rights. Within a few months, the West Bengal Government submitted a 2,500 word memorandum to the Union which included as the central theme the idea that the Centre should

not find it possible to use all "manner of pressures" upon the States (Jacob, 1978). It specifically pleaded for abolition of the power to declare Presidential rule in States and of dissolving duly elected assemblies, seeking obliquely the nullification of the dissolution case decision as well. In this sense, the present case generated new articulation of demands for State autonomy: politics of the future was also not unserved by the Court, although this happened somewhat latently.

F. ON HOW TO AVOID "LEGICIDE" OF CIVIL LIBERTIES: THE MESSAGE OF *MANEKA*

In a sense, *Maneka* is all about impounded passports. But in intention and impact it constitutes an attack against the impounding of the right to life and personal liberty in Article 21 ever since *Gopalan*. In a sense, too, *Maneka* is an elaborate obituary note on *Gopalan*.

As happens to all seminal decisions, the decision in *Maneka* is not without its meanderings and mysteries. And yet already it radiates the jurisprudence of the Court beyond the parameters of whatever it might be read to have "held". The decision is of enormous symbolic significance, as it is the first major decision touching personal liberty since *Shiv Kant*. Therefore *Maneka* vibrates with humanism and single-minded judicial dedication to the cause of human rights in India, still recovering from the trauma of the suspension of civil liberties in 1975-77. Indeed, *Maneka* marks the resurgence of the human rights conscience of the Court.

Mrs. Maneka Gandhi's passport was impounded by an order dated July 2, 1977. The Passport Act, itself a fine example of the impact of judicial decision, was the result of *Satwant Singh* which held that the right to travel was an aspect of "personal liberty" and that it can only be governed by a law establishing procedure and not by executive fiat or discretion alone. The Act provided not merely for the issuance of the passport but also for its refusal, revocation and even impounding in certain well-specified situations. Section 10, which did this, provided that the passport authority must record in writing his reasons for an order impounding or revoking

passports, that such reasons be made available to the aggrieved on demand and that in the assured right to appeal to the Central Government reasonable opportunity to be heard was to be provided. There is, however, one simple catch. If your passport is revoked or impounded on the grounds mentioned in Section 10(3) of the Act, the government may decide not to give you any reasons if this information is not "in the interest of sovereignty and integrity of India, the security of India, friendly relations with any foreign country or the interests of the general public". No reasons, no right to appeal.

The petitioner Mrs. Maneka Gandhi, was affected by the exercise of this discretionary power. She challenged it on the ground of *mala fides* (not really pressed in hearings) and Article 14. Five weeks after the petition was filed, it was expanded by additional grounds that both Article 21 and Article 19 were also infringed by the government action. Petitioner was a journalist and her rights were unreasonably affected by the order; and personal liberty was affected, in the shape of the right to travel abroad, by a procedure which, though established by law, was patently unfair and arbitrary.

It is the addition of these later grounds, almost as an afterthought, which transforms *Maneka* from the simple passport situation to one of immense constitutional significance. It is puzzling that these daring grounds were introduced in the argumentative strategy at a later stage, on second thoughts. But it gave the Court a good opportunity to declare that it was on the side of civil liberties. The need to so declare arose (and declare the rather obvious) in view of events of February, 1977 where a lot of undignified controversy over the appointment of the new Chief Justice focussed national attention to the *Shiv Kant* case: the uninformed criticism of judges and Court was likely to grow. The petitioner's additional pleas served high constitutional purposes by giving the Court the opportunity to pronounce firmly on the ambit of Article 21 and its relations with the rights in Articles 14 and 19. If *Shiv Kant* provided not much opportunity for the display of judicial valour, *Maneka* did not demand a very high role for prudential considerations either.

The Court thus is able to demonstrate that it is as committed to the high constitutional values as those who formed the new government and as the people who voted them into power in the extraordinary Sixth General Elections. The motivation for such demonstration must have been especially strong for the three justices who participated in the *Shiv Kant* decision: there is thus a certain contextual poignancy concerning the opinions of Justices Beg, Chandrachud and Bhagwati. Any assessment of *Maneka* which ignores this would be flawed to this extent.

The elaborate opinion of Justice Bhagwati (for himself and Justices Untwalia and Fazal Ali) is a gem of judicial craftsmanship and creativity. The truly noble sweep of Justice Bhagwati's opinion is memorable not just for its high constitutional vision but for its well chiselled formulations on the nature and scope of fundamental rights and the general approach to constitutional interpretation. While this creative exuberance is applauded by Justices Chandrachud and Beg, they endeavour in their own ways to limit the reach of *Maneka*. In a gently and graciously administered corrective to Justice Bhagwati, Justice Chandrachud says: "Our Constitution too strides in its majesty but, may it be remembered, *without* a due process clause" (p. 327: emphasis added). He also, while agreeing with Justice Bhagwati, holds forth a model of reticence for the Court: "I will say no more because in this branch, one says no more than the facts warrant and decides nothing that does not call for a decision" (p. 328). (Incidentally, this is a counsel which the States in the dissolution case and the Chief Minister of Karnataka in the enquiry case would have been happy to have had extended to them!)

Chief Justice Beg, at the end of his term, still remains concerned to explain *Shiv Kant*, and his specific role in its formulation. He takes the opportunity again to reiterate what was meant by saying that natural rights were merged, to some extent, in constitutional rights (p. 395-401). In the immediate case, he does not want to go by any concessions offered by the Attorney-General. He simply strikes down the impounding order as invalid, a step which did not commend itself to his brethren

though this was (in my opinion) not merely logically correct but a sound policy step, which would have resolved the problem of the legal status of many of the discourses and observations in *Maneka* for a future Court. Justice Beg, also, consequentially would award the costs. But he goes further to add, what appears to me as rather novel, an extension of the principle that justice must not merely be done but seem to be done. The impugned order fails to meet this principle of manifest doing of justice because, he says, it raised the possibility *in the mind of the petitioner* of some "undue prejudice" against her. She has, therefore, not merely to be protected against the denial of rights but also against the "*appearance of such prejudice or bias*" ; since the order was not "patently impartial", it ought to be struck down (p. 403 : emphasis added).

I am not a close student of administrative law, but I had always thought that the maxim requiring that justice must seem to be done was the underlying justification for the law against bias in administrative action. But the maxim, for operational purposes, meant that certain well crystallized rules about bias must be followed ; and such bias must be shown, as a matter of reasonable likelihood, if the Court were to invalidate administrative acts. The mere appearance of bias in the mind of the petitioner has not so far been employed as the principal or auxiliary technique of judicial control over administrative proceedings. This must have the simple explanation that in the mind of the petitioners there might always exist this kind of feeling. People more competent in administrative justice must now debate whether Justice Beg's observations represent a fresh start or a false one.

Compared with Justice Beg's rather unhistoric-looking concurrence with Justice Bhagwati (excepting for the infusion of the somewhat novel idea concerning "appearance of a bias"), Justice Krishna Iyer adds high drama to *Maneka* by saying it promises more than a "phoney freedom", a maxim on which he was to act so swiftly and thoroughly in his later decisions. Justice Krishna Iyer is less bourgeois in his appreciation of the importance of passport justice (for once he does not use this

kind of phrase !). It extends, he says

> to the hungry job-seeker, nun and nurse, mason and carpenter, welder and fitter and, above all, political dissenter (p. 341).

What have all these people to do with passport law and justice, you may ask in your impatience? But Justice Krishna Iyer has a good answer which I quote :

> Today, a poor man in this poor country despairs of getting a passport because of invariable police enquiry, insistence on property requirement, and other avoidable procedural obstacles. And if a system of secret informers, police dossiers, faceless whisperers and political tale-bearers, conceptualized and institutionalized 'in the public interest' comes to stay, *civil liberty is legicidally constitutionalized*, a consummation constantly to be resisted (p. 349 : emphasis added).

Although the observations are made in the context of passport justice, the tenor of observations reaches the roots of "legicide" of civil liberties in the events of 1975-77 and the phrase 'constitutionalization of legicide' of civil liberties bears an oblique reference to *Shiv Kant*. Elsewhere too, in a not too well-concealed, but still not very overt, reference to the emergency and the *Habeas Corpus* decision, he warns that "scary expressions" like " 'security', 'public order', 'public interest', 'friendly foreign relations' " are "verbal labels" which can no longer mask "real values" in the "exploration and adjudication of constitutional prescriptions and proscriptions". "Greater the power" he maintains "the more dangerous the abuse". The "reality of liberty is not to be drowned in the hysteria of the hour" and the "hubris of power". Governments, he says, "come and go but the fundamental rights of the people cannot be subject to the wishful value-sets of the political regimes of the passing day" (p. 345). No Court can possibly show greater concern for civil liberties.

But it is in the opinion of Justice Kailasam that we see some challenge to Justice Bhagwati's main positions, and certainly to the creative exuberance of that opinion. Justice Kailasam reduces, almost on all issues, the problem to one of

mere law and legal interpretation, robbing them of any transcendent significance. Justice Kailasam offers a cogent demonstration of how the Court may read its own decisions at a level of strict legalism: he establishes that *Bank Nationalization* misread *Gopalan* and produced itself "obiter dicta based on the wrong assumption" (p. 373). The authority of that case is therefore shaken. But, as we shall see, Justice Kailasam's own conclusions do not assail the result and some part of operative reasoning of Justice Bhagwati's opinion.

Justice Bhagwati is as sensitive to claims of legalistic craftsmanship as his brother and he is also a masterful exponent of legalistic style of analysis and opinion-writing. But in *Maneka* there is the dynamism of juristic activism in his opinion which Justice Kailasam does not share. Such activism must of necessity range over not just the *law* of human rights but the *politics* of human rights as well. This Justice Kailasam wants to quite scrupulously avoid. Justice Bhagwati had become aware through his own agonizing in *Shiv Kant* that rigid adherence to legalism is not always a source of strength in the difficult task of upholding basic human liberties; he, therefore, consciously endeavours in *Maneka* to strike a balance between the reticence of legalism and the inherent dynamism and openendedness of what I have elsewhere termed "juristic" (as distinct from "judicial") activism. Justice Bhagwati felt that it was necessary, jump by jump, rather than step by step, to build a fortress around Article 21. Justice Kailasam felt that even if this was in itself desirable this should be done in a "lawyer-like" way rather than by hunches and hopping. To this, brother Bhagwati responded rather well in his opinion: Justice Kailasam's stance reinforced his own overall preference for the legalistic model of opinion-writing. In this way, the very styles of judicial craftsmanship become an important *resource* in protection of human rights and fundamental freedoms. Critics of the Court who, finding the conscientious revisitation by Justice Kailasam into the errors of past decisions a bit too arid and even anachronistic in *Maneka*, turn away from the subtle dialogue on styles of craftsmanship between the two justices help weaken this very resource. They ought, therefore, to pay as close a comparative attention to Justice Kailasam's opinion as they pay to that of Justice Bhagwati.

G. THE BIRTH PANGS OF DUE PROCESS: MEANING OF *MANEKA*

The importance of *Maneka* lies mainly in the art of constitutional interpretation. For the first time, the Court unequivocally commits itself to the proposition that Article 21 does not exclude Article 19. This means that a law taking away the right to life or personal liberty will have "to meet the challenge" of Article 19, if it affects by way of unreasonable restriction any of the seven freedoms. The Court also categorically commits itself to the position that the procedure established by law for deprivation of life and personal liberty must answer the requirements of Article 14. Or, in other words, it must be "reasonable law, not any enacted piece" (p. 338: *per* Krishna Iyer, J.). The procedure prescribed must not be "arbitrary, unfair or unreasonable". Articles 14 and 21 read together require that the procedure prescribed by the law must be "right and just and fair" and not "arbitrary, fanciful and oppressive" (pp. 281,284: *per* Bhagwati, J.). It seems that *Maneka* is struggling to give birth to due process of law in the hostile teeth of Article 21. Earlier attempts to bring it forth, in the Constituent Assembly and also in the decisions of the Supreme Court, miscarried. But does this Court really deliver unto the people the right to a "due process of law" in relation to deprivation of the right to life and personal liberty? This is the most important question from the standpoint of human rights standards as well as from that of the politics of human rights in a resurgent India. It could be answered by a look at what the Court *does* with what it *says* in *Maneka*.

The Passport Act, as noted earlier, provided that the authority can impound or revoke passports on any of the grounds specified in Section 10. The authority is required to record in writing its reasons and to furnish, on demand, a copy of the same. There is a right to appeal to the Central Government against any order passed by the authority and a further requirement that such appeals may not be disposed of without giving to the affected party "a reasonable opportunity of representing

his case". However, if the Central Government itself was the author of the order, no appeal would lie against it. The authority has the power to refrain from furnishing reasons in relation to the order impounding passports in the situations specified in Section 10(3) of the Act. The question was whether this was fair procedure. The entire Court encountered no difficulty in construing the section as providing for a right to hearing by necessary intendment or implication. Justice Bhagwati insisted, in words which will be quoted repeatedly in the future, that a right to hearing was to be implied because "the soul of natural justice is 'fair play in action' ". *Audi alteram partem* is a "wholesome rule designed to secure the rule of law and the Court should not be ready to eschew its application in a given case". The core of the rule or maxim consists in the principle that the "person affected must have a reasonable opportunity to be heard and the hearing must be a genuine hearing and not an empty public relations exercise". The fair hearing rule may "suffer situational modifications" but its "core" should never be allowed to be sacrificed (p. 291). In situations where the right of hearing might itself defeat the aim of expeditious administrative action (like impounding of passports), courts may construe an exclusion of the *audi alteram partem* maxim but only momentarily. The rule should not have the effect of "paralyzing the administrative process or the need of promptitude or the urgency of the situation". Such situations, by definition, would be few, and even here statutes should be construed to make the exclusion of the rules of natural justice momentary. In other words, even such administrative action should be followed by post-decisional hearing, remedial in nature and one which enables the party to have a meaningful opportunity to be heard. The order in the present case provided no such post-decisional opportunity to be heard and the reasons for impounding the passport were not even furnished. The order was therefore void and liable to be set aside but all the justices, save Chief Justice Beg, did not do so in view of the Attorney-General's undertaking that this vice would be rectified.

This is certainly a genuine advance, though not altogether discontinuous with the Court's own well-developed decisional

law on the right to hearing. But in view of the attempted expansion of the ambit of Article 21 freedoms, the insistence on "genuine" hearing is quite significant. And the word "genuine" is quite crucial as a new standard for assessing the "meaningfulness" of the right to a hearing.

So far, so good. But what if a statute leaves no scope for any construction by necessary intendment? Supposing the Passport Act had said as follows: when passport is impounded, revoked or refused on the ground of national security, sovereignty and integrity of India, the authority shall not communicate reasons to the aggrieved party, there shall be no appeal against the order, no hearing at any, including the post-decisional, stage and, finally, the reasons shall be privileged—that is upon a suitable declaration by the Government to that effect the reasons shall be deemed to relate to national security etc. and shall not be made available to the party or produced before any court. Would this constitute a violation of the right to personal liberty as now expounded in *Maneka*? In this question lies the acid test of *Maneka's* proclamations concerning the significance of the new life of the right to personal liberty. I hope that I am wrong when I say that it is just here that *Maneka* falters and even fails.

Justice Bhagwati has one sentence which might furnish the clue to his answer to such a question. That is that if the statute itself provides for the exclusion of the *audi alteram partem* rule, then "no more question arises" (p. 284). Of course, Justice Bhagwati seems more concerned at this stage of his opinion with the question of *construction*, as distinct from the question of *validity*, of the impugned section. So, in that sense, he does not find himself confronted with a statute which excludes *in terms* the *audi alteram partem* rule. One can then explain his observation to mean that when the statute excludes the rule, "no more question" of *construction* arises. What would then arise will be a pure question of *validity*. One wishes that if this were the real thrust, Justice Bhagwati were a trifle more elaborate. This is because Justice Kailasam *is* quite elaborate. He, too, rules that "it cannot be denied that the legislature in

making an express provision may deny a person of the right to be heard" because the rules of natural justice "*cannot be equated with the fundamental rights*" (p. 382: emphasis added). The precise import of this last observation is made crystal-clear when he holds: "I am unable to say that a provision which empowers the authority to decline to furnish reasons for making the order is not within the competence of the legislature" (p. 388). He tries to soften the blow by saying that such situations would be extremely rare. Yet, rare or not, they may arise: and when they do, the legislature has the power of excluding natural justice rules. If so, the new "incarnation" of Article 21, which struggles to manifest itself through a moving, splendid effusion of rhetoric, does not really set any basic limits to legislative power. In other words, Parliament may still establish any law or procedure through law to achieve deprivation of personal liberty. This appears to be the real meaning, although much of the language and discourse in *Maneka* emboldens one to hope otherwise.

Both the opinions find reassurance in the law as it exists, that the decision not to furnish reasons to the aggrieved rests with the Central Government. To Justice Kailasam this is reassuring since this power is vested in "the highest authority". Even Justice Bhagwati maintains that it can be "safely assumed that the Government will exercise the power in a reasonable and responsible manner" and the fact being that it is vested in "a high authority like the Central Government, abuse of power cannot be lightly assumed" (p. 294). The Court was, interestingly, able to make this observation *in the very case where it almost held* (but for the Government's own admission and rectification) *that the power was at least not responsibly exercised by the "high authority"*.

In any case, it is high time that this elitist view of high authorities be drastically modified, if not altogether abandoned. If it was not clear in the India before June 1975 that high authorities can be just as unreasonable and irresponsible in exercising their legal powers, and I feel that it was, the events of 1975-77 have proved beyond much doubt that the incidence

of arbitrary exercise of power escalates with the hierarchical layers. It is a little surprizing that even Justice Kailasam who devotes a major part of his opinion castigating the Court as an institution for misreading and overlooking its own decisions in the development of constitutional jurisprudence should himself overlook Justice Subba Rao's observations on this matter. Speaking for a unanimous Court in *Mineral Development Ltd.* v. *State of Bihar* (AIR 1960 SC 468) he said:

> [W]e do not intend to lay down as a proposition that whenever discretionary power is conferred on a State.. or the Union Government, the said law must necessarily operate as a reasonable restriction on a fundamental right. *Such a general proposition negatives the concept of fundamental rights for the simple reason that fundamental rights are guaranteed against State action* (p. 472: emphasis added).

Though the language of "reasonable restrictions" is inapposite to Article 21, the theme of this observation is equally applicable to Article 21 rights. Justice Subba Rao's views, expressed on behalf of the Court, have been unduly ignored, and so have Dr. Basu's tireless efforts to impress the Court with the need to "turn the tide regarding such overconfidence in superior administrative authorities" (1972: pp. 250-53).

The central point then remains that despite the lofty rhetoric about Article 21 rights in *Maneka*, its actual holding does not quite amount to saying that Article 21 operates as a limitation on legislative power or that it imports a certain minima of the right of genuine hearing in laws establishing procedures affecting personal liberty rights. There is one slight exception to this statement, which may prove of significance in and beyond the passport legislation. But one is not wholly sure. Justice Bhagwati hints that impounding a passport for an indefinite period of time, as in the present case, "would clearly make the impugned order unreasonable" (p. 317). But the assurance by the Union that the period will be determined as six months from the date of the Court's decision prevents any further elaboration of this rather important point. One is not quite sure whether a duration of time

or rather the definiteness of the duration is constitutionally required under the new interpretation of Article 21 read with Article 14 and if so whether it would also apply to revocation and refusal of passports. Can the duration requirement be generalized to other administrative/quasi-judicial decisions?

What then is the message of *Maneka*? Perhaps, it lies more creatively in the realm of Article 19(1)(*a*) and (*g*), rather than in Article 21 simpliciter or as read with Article 14. In a beautifully lucid and seductively persuasive opinion, Justice Bhagwati eatablishes that freedom of speech and expression, and that of profession, is "exercisable not only inside...but outside" India. There are no "geographical limitations" to the exercise of these freedoms (p. 304). On the other hand, he is quite clear that the "right to go abroad" is a right of personal liberty in Article 21 but it "cannot...be regarded as included" in freedoms guaran'eed under Articles 19(1)(*a*) and (*g*) (p. 311).

Of course, this does not mean that denial or restriction on right to go abroad may not adversely affect the rights to free speech and expression and to trade, business and professi n. If a petitioner can discharge the burden of showing that such denial or restriction has a "direct and inevitable" consequence or effect on the exercise of the above-mentioned Article 19 rights, then action under passport law may need to be justified as reasonable restriction under relevant parts of Article 19 itself. But the denial of the right to go abroad must "in truth and in effect" affect the two relevant freedoms; a remote effect would not do (p. 312). Brother justices go along with Justice Bhagwati: Justice Krishna Iyer is in such total agreement with Justice Bhagwati that he claims he "goes whole hog" with him! The only exception is Justice Kailasam. He does not quite join issue with Justice Bhagwati but he is rather unwilling to concede any "extra-territorial" operation of Article 19(1)(*a*) and (*g*). The word "extra-territorial" in *Maneka* opinions is rather misleading; the only question is whether the State can by its laws make stipulations disabling Indian people from speaking freely or from carrying on trade, business or profession abroad.

Unlike the "hungry job-seekers" of Justice Krishna Iyer, Justice Bhagwati has in mind the upper strata of Indian society—musicians and dancers, visiting professors and research scholars and journalists. These people's rights may be severely affected by adverse stipulations in passport laws and procedures. Justice Kailasam does not quite meet this point. In any case, after a very long and interesting detour on the relationship of Articles 19 and 21, Justice Kailasam decides that the question of "extra-territorial" scope of freedoms under consideration does not really arise in this case (pp. 352-61). At the end of it all, he too is in agreement that if passport restrictions affect fundamental rights "directly and immediately" they will need to be examined (p. 377).

In other words, the right to travel abroad is a concomitant of right to locomotion under the range of "personal liberty" in Article 21. It is not, like the right to freedom of the press, or the right to privacy, a logical concomitant of Article 19. So, we are back to the problem about Article 21 posed earlier. If the law provides procedure which excludes, in well-defined situations, the minima of effective hearing, it will still be valid law.

Such a law is within the legislative competence and Article 21 does not operate as a restriction on it. However, if there is abuse of power "the arms of the Court are long enough to reach it and to strike it down" (p. 294 : *per* Bhagwati, J.). But history has shown that if the arms of the Court are long, the arms of Parliament are also long enough. If a provision like Section 16A(9) of the MISA were to appear in passport law or any other law propounding a "genuine rule of evidence" and making non-disclosure of grounds to the parties and non-production of these to the Court upon a declaration that the matters relating to these decisions involve national security and integrity and sovereignty of India, such a law will still not be *ultra vires* of Article 21 by itself or read with Article 14. The *Shiv Kant* situation may thus survive into the post-emergency period, lying handy, in any case, as a resource during the period of constitutionally proclaimed emergencies.

Perhaps, the validity of such a provision may be open to attack on the *Maneka* holding on Article 19(1)(*a*) and (*g*). But please note that one will have to show that the effect of such a provision is nefarious for these freedoms in terms of its immediate and direct impact on the Article 19 freedoms. It appears from *Maneka* observations that standing to challenge would only ensue if the petitioner is able to show that at the time of the decision of revoking, refusing or impounding passport he was ready, willing and able to go abroad with the aim of exercising the rights of free speech and profession, and not for any other purpose. My right to go just for a holiday or for medical care is not covered by all this and the MISA type insertion in passport law may leave me without relief.

But one must count one's constitutional blessings. At least if I am ready, willing and able to go abroad for these specific Article 19 purposes, *Maneka* enables me to move the Court. But security of State is a ground for restricting my right to free speech and in the hypothetical example that is also the very ground to deny me the right to travel: so that the outcome of my petition may turn out to be rather complex. (In addition, of course, to the fact that after paying my counsel's fees, I might not really be able to afford to go abroad!) The situation in regard to Article 19(1)(*g*) appears a little clearer: but only a little. There the major ground of restriction is the "interest of the general public". But the situation is clearer only in our hypothetical case. In actual life, we might turn out to have different sets of problems. The problem may not be for Justice Krishna Iyer's "nun and nurse" or "welder and fitters" but for the better-off groups. Suppose that the passport law is suitably modified to refuse or revoke or even to impound passport of nuclear physicists or astrophysicists, or scientists, doctors, pilots and others to prevent the "brain drain". Can this be regarded as unreasonable restriction, assuming further that there is massive manpower planning to employ these talents suitably at home. Would this be held as unreasonable restriction on Article 19(1) (*g*)? Would the post-*Maneka* Article 21 help?

The merit of *Maneka* lies in the opening up of a new constitutional pasture of indubitable significance to a whole range of fairly mobile social groups and for groups whose mobility is the product of sheer desperation. But beyond this? If the aspiration of the Justices who participated in *Shiv Kant*, and others who did not approve of what happened there, was to make a *Shiv Kant* type situation difficult for the State in the future, one has to say regretfully that it has not been achieved. The Court could have, but did not, serve notice that the Constitution is hostile to any purported rules of evidence like the deceased Section 16A(9) of the MISA and that any functional equivalent of it will not be sanctioned even when Articles 21 and 14 are "suspended" during constitutionally proclaimed emergencies. *A fortiori*, such prototypes are, the Court could have said (but it did not), impermissible during "normal" times.

To say that such indication was not germane to the issues in *Maneka* would be correct, at one or the other level of generalization of the fact-situation in that case. But then there are a whole lot of things not quite germane to the fact-situation in *Maneka*, at some levels of generalizations, as anyone reading Justice Kailasam's opinion a little closely would recognize. Much of *Maneka* is in the nature of considered dicta, however magnificent. Remember that lots of concessions were made by the Attorney-General and they were accepted and the order was *not* set aside. In a sense, *Maneka* is a kind of advisory opinion in the guise of contentious proceedings. But must one rob *Maneka* of its majesty and grandeur this way?

I think not. *Maneka's* immediate constituency is the Indian middle classes, particularly those who work with their heads rather than hands. They must feel assured that the Court protects their right to go abroad. And they must appreciate the Court's gesture. But, if we go the Krishna Iyer lane, other groups—the toiling masses of skilled workers—are also assured that the Court cares for them. *Shiv Kant*, they are being told, was an aberration of an exceptional nature. Also, those associated with the previous regime are assured that the Court will be zealous to protect their rights. And everyone is generally reminded that the Court is, when all is said and done, the final protector of their liberty.

And the Government, whose initial wrong decision brought the petitioner to the Court in the first place, is fairly continuously complimented by the Court for its fair-minded "concessions" on various points during the arguments! But the Passport Authority is in for some education: Justice Bhagwati's opinion ends with reminding it that the right to travel abroad is a "basic human right" enshrined in the Declaration of Human Rights, that it is a "highly valuable right" and an important aspect of personal liberty related to the "spiritual dimension of man". The Court reminds him and the executive generally that in the past they have been rather naughty. People have not been allowed to go abroad because of "views held, opinions expressed or political beliefs or economic ideologies entertained by them" (p. 322). The Court does take judicial notice of abuse of power, even by the previous governments at the Centre, though earlier it had little difficulty in advancing the argument that people in high positions would use their discretion responsibly! So, the decision ends with expressions of *hope* that

> such cases will not *recur under a Government constitutionally committed to uphold freedom and liberty* but it is well to remember, at all times, that eternal vigilance is the price of liberty, for history shows that it is always *subtle and insidious encroachments made ostensibly for a good cause* that imperceptibly but surely corrode the foundations of liberty (p. 322: emphasis added).

In other words, the message of *Maneka* is *yet again* an institutional accommodation between the Court and the executive. The task of maintaining "the foundations of liberty" is a joint venture, both of the Court and the Government. No doubt, there is the legislative power to banish *audi alteram partem* by explicit legislative formulations in matters relating to Article 21 rights but the Government "constitutionally committed to uphold freedom and liberty" is just not expected to use this power. There is of course the iron fist in the velvet glove: "the long arm of the Court" is not paralytic or rheumatic and will swing into action to strike at abuse of power.

As for the Bar and the Court in the future *Maneka* provides a splendid example of what I have described as "juristic activism". By this I mean, "the introduction and elaboration of new ideas and conceptions without at the same time using these in deciding cases at hand" (Baxi, 1978: xxix). *Maneka* abounds in new ideas and conceptions for the future use by the Bench and the Bar. It nourishes, for example, the rule of law notion as an aspect of the basic structure through its innocuous-looking discourse on the "core" of natural justice, particularly the right of "genuine" hearing. If a *Shiv Kant* type MISA amendment occurs in the future, there is enough dynamism and inspiration in *Maneka* to generate functional judicial leeways of choice (*see* for this notion Stone, 1964: 234-300). Legalistic justices can reduce most of *Maneka* to massive obiter; the activists can pour greater content, and the timorous and confused can be made to sway by its high majesty and sweep in accepting any argumentative strategy based upon *Maneka*.

This then is the beauty of *Maneka*, whatever be its ultimate constitutional destiny.

If you gather from these observations that I am a little proud of the Supreme Court of India, you will be quite right.

H. THE RIGHT TO PROPERTY AND THE POST-EMERGENCY SUPREME COURT

The right to property, or more accurately the immunity from confiscation has been the focal point of the struggle for hegemony between the Court and Parliament. Article 31 has been an important arena of constitutional politics. By and large, the Court has done well and those who say that it has been a road block to socio-economic progress, especially in the area of land reforms, are making an adverse political or partisan assessment without a total analysis of the Court's work, styles or attitudes. There has been, in other words, a process of systematically distorted communication affecting the image of the Court rather adversely. The struggle has, in fact, not really been about property versus progress. Article 31 has merely served as a peg on which have hung the vital questions of limits of State power and the role of the Court. The Court has clearly established the position that it too has some say, even a final say, in

matters of constitutional change. It has claimed and exercised constituent power. Based on this, Indian scholars have produced a kind of literature, rich and varied and thought-provoking, which should be the envy of any society interested in the architectural problems of constitutional order in a "developing" society. We emphasize the relevance of this literature, especially to the Court, as there now appears the feeling that with the passage of the Forty-fifth Amendment Bill, much of the controversy will be reduced to a chapter in the constitutional history of India. This, to my way of thinking, is unlikely to happen, even when the right to property may be ceremonially demoted to a lowly, non-fundamental political and constitutional status.

It is not possible nor necessary here to revisit the literature. But in order to provide some context to the study of decisions on property, it is necessary to say that the Janata Party manifesto included the pledge of abolition of the right to property and provision for the right to work. Even during the emergency, it was not found politically prudent for the regime to formally exile or demote the right to property: this is a puzzle in itself, which any fuller account of the juristic aspects of the emergency must adequately take into account. However, what was meant by "abolition" of the property right naturally took some time in crystallizing. In October 1977, the pledge seemed to mean an amendment of Article 31C to restore it to its pre-emergency position (Dhavan, 1978: 254). By November there was talk of a comprehensive amendment of Articles 31 and 19(1)(*f*), though the latter was a source of some complexities. The Bill as it emerged on May 15, 1978 provided a scheme for the demotion of the right to property to a non-fundamental status: it remains in the text of the Constitution as Article 300A (numerically speaking, this is quite an elevation!) but only as a stipulation requiring authority of law for deprivation of property. Article 31 now disappears. Article 31C remains as it was and Article 19(1)(*f*) is deleted. The Ninth Schedule survives. Even the requirement of public purpose is eliminated.

The point is that there was an anxious process of formulation of proposals and counter-proposals, attended by some media

discussion, in the period October '77 to May '78. It was during this period that the Court had to deal with three major situations involving property rights, and one minor challenge. The latter was represented by the writ petition of three legislators claiming that their right to receive salary was a fundamental right affected by the dissolution of legislative assemblies. The reason why the Court gave such short shrift to it is understandable: this was no time to raise cries that property rights were affected. More fundamental things were at stake in that case in any event. But the other three cases mercilessly brought into focus the challenge on the specific ground of the violation of property rights. *Reddy* was decided on October 11, 1977; *Pathak* on February 21 and *Prag Ice and Oil Mills* by Chief Justice Beg on Febuary 21, 1978 and by the other Justices on May 5, 1978.

Reddy involved a rather unusual Karnataka High Court decision holding, in effect, that the acquisition of certain properties of private bus operators in a scheme of "nationalization" was not an acquisition for "public purpose". The reasons for so holding were that much of the property so acquired was available in the market and there was no compelling necessity for the State to acquire the property: manifest State necessity, the Court ruled, was a precondition for the exercise of the eminent domain powers, a rather novel proposition for Indian jurisprudence which the Supreme Court refused to sanctify. The second ground drew inspiration from *Kameshwar Singh* which had said that acquisition of choses-in-action cannot be for a public purpose as its object and result would be to augment the revenues of the State. The Supreme Court had no difficulty in overruling this holding either. A clear doubt was expressed whether commercial activities of the State may not fall within "public purpose" and whether the broad formulation in *Kameshwar* that acquisition of chattels or moveable property cannot by definition, as it were, be for public purpose was quite correct (pp. 480-88: *per* Untwalia, J.). But the specific question was not finally ruled upon as this "was not a case where some moveables were merely acquired for augmenting the revenue of the State or for its commercial purposes" (p. 480). The Court

in *Pathak* was shortly to rule that there was no reason why choses-in-action cannot be acquired for public purposes. But it was to do so without the benefit of the questions raised in *Reddy* in which at least four senior justices who participated in *Pathak* were a party to the clear doubts expressed by the Court. The tendency to selective advertence to their own decisions continues unabated.

Reddy would not have been conspicuous in the annals of the post-emergency Court if this was all that it really decided. What lends to it considerable significance is that it widens the range of "public purpose" in a manner that has never been done before. For example, the Court says:

> The State may need chalk or cheese, pins, pens or planes, carts, cars or eating houses or any other of the innumerable items *to run a welfare-oriented administration or a public corporation or answer a community requirement* (p. 502: emphasis added).

The Court then illustrates:

> If a fleet of cars is desired for the purpose of conveyance of public officers, the purpose is a public one. If the same fleet of cars is sought for fulfilling the tourist appetite of friends and relations of the same public officers, it is a private purpose. If bread is seized for feeding a starving section of the community it is a public purpose that is met but, if the same bread is desired for the private dinner of a political maharajah who may *pro tem* fill a public office, it is a private purpose. Of course, the thing taken must be capable of serving the object of the taking. If you want to run the bus transport, you cannot take the buffaloes! (p. 502)

With all this goes a touching proclamation of the "faith in Parliament" (p. 506) and a clear admission that the "Court is not the only sanctuary in a democracy against a caprice dressed in 'little brief authority'"(p. 506). The other sanctuary is provided by the forces of history. If the Government resorts to indiscriminate acquisition of property "with a view to pay nominal sums and get away with it" the legislature and the Government will

"without the Court's services go the way world history has blown away gross mis-rule" (p. 506). But lest the forces of history be a little slow and inadequate for affected human beings in time and place, the Court indicates that it will have "enough powers" under the Constitution "to speak for the law and *to save the Government from itself*!" (p. 506: emphasis added).

Justice Krishna Iyer says that the Court has to be "role-conscious" (p. 497). This entails articulation of "judicial perspectives" and "juristic attitudes" of the Court for the guidance of the legislature, executive and the people at large. The Court must abandon "formal legalistics and sterile logomachy in assessing the *vires* of statutes regulating vital economic areas" (p. 496) and learn or strive to bridge the "all-too-large gap between the law and the public needs...by broadening the constitutional concepts to suit the changing social consciousness of the emerging welfare State". This would also help the Court to avoid the "institutional crises and confrontations" which it must and can avoid by "progressive interpretation" and by bringing to bear upon the interpretative process a value judgment in tune with the 'welfare' wavelength of our Constitution and the still, sad music of Indian humanity"(p. 517). "Ritualistic construction" will weaken "the socio-spiritual thrust of the founding fathers' dynamic faith" (p. 516).

This is a noble judicial manifesto, appropriate to the euphoria of that time. The very definition of the "committed judiciary" can be provided in the words used by Justice Krishna Iyer. It is this very kind of judicial manifesto which the previous regime had been wanting. It did not get it, by an irony of history (or was that a force of history?). And the new Government is not wholly sure that it wants such vigorous approval from the judiciary. This is clear from the fact that property right still retains a constitutional status even if not a fundamental one and as the attempted restoration of the position of Article 31C as it stood in the Twenty-fifth Amendment would tend to show. The Fourty-fifth Amendment Bill shows a rather healthy respect for property rights insofar as Articles 14 and 19 cannot be

overrun by any zeal to implement directive principles other than clauses (*b*) and (*c*) of Article 39, an article of rather wide generality.

At any rate, by its interpretation the Court in a sense legitimates the demotion of the constitutional status of the right to property. By its widest possible benediction to legislative determination of public purpose, coupled with its interpretation of Article 31C, it ensures that even if because of the political difficulties then prevailing with regard to the amendment of the Constitution, the Constitution cannot be amended in this respect, the Court in its constituent power was hereby demoting the status of this right.

I am not concerned with the intention of the distinguished justice or the nobility of high purpose of socio-economic change (which I have always urged as a wise canon of judicial interpretation by the Court as well as the exercise of the constituent power by the Court). All I am at the moment concerned with is the emphasizing of the result. And the result is undoubtedly politically significant. This significance does not just lie in the judicial attenuation of the right to property to a vanishing point (in a fact-situation which could otherwise have been rather easily brought within the confines of the Court's existing decisional law framework). It is also latent in the clarion call for avoiding institutional crises and confrontations between the three major branches of the national government, although as regards property rights *Kesavananda* had already provided firm basis for such accommodation. The political significance of the decision lies rather in the notice that Justice Krishna Iyer serves to the Government and legislatures :

> There is another stark possibility—the Administration sliding back from the progressive constitutional values to protect private interests ; and then the Court may activate the "welfare jurisprudence" of the Constitution by *appropriate commands* (p. 518 : emphasis added).

This means that the call for "progressive interpretation" of the Constitution does not mean surrender of the political power of the Court on the terms that any political party may demand. Such interpretation is in service only if the party in power does not "slide back" to protecting private property interests, a distinct possibility present in the early discussions of constitutional amendment when this case was decided. The Court reserves to itself the power to issue "appropriate commands" to the other agencies of national government in case the power thus granted is not used for the purposes for which it is granted. The Court thus reminds one and all that it is a centre of political power and that it will use its power if necessary at the risk of playing oppositional politics. This is a striking assertion of the oppositional role of the Court in what is largely a one-party national government, despite the significant emergence for the first time in the political history of India of a substantial opposition party.

If I have ignored the legal aspects of the decision here, it is only because I am swayed by the Court's call for "progressive interpretation" of the Constitution. It would be somewhat mean to descend to a merely technical analysis of Justice Krishna Iyer's vigorous assertion of the political role of the Supreme Court, especially when he speaks for himself and Justices Bhagwati and Jaswant Singh, and when the leading opinion by Justice Untwalia speaking for himself and other Justices (Justices Beg, Chandrachud and Kailasam) only files a reservation with that part of Justice Krishna Iyer's opinion which deals with Article 31C (p. 493). In any case, *Pathak* demonstrates why the Court, despite the commonality of senior justices who heard it after *Reddy*, does not even refer to *Reddy*! Now we turn briefly to *Pathak*.

I. THE COURT AS A CORRECTOR OF EMERGENCY EXCESSES

In *Pathak*, Parliament had sought to abrogate a settlement on the issue of bonus, operative from April 1, 1973 to March 31, 1977, through Section 3 of the Life Insurance Corporation (Modification of Settlement) Act, 1976. The Act only affected the bonus, under the settlement, in relation to Class III and IV employees and even these with effect from 11 Aril'975 .Before the Act was passed, the employees had

already secured a *mandamus* to the LIC from the Calcutta High Court, commanding the LIC to pay the bonus due for the period April 1, 1975 to March 31, 1976. Parliament acted oblivious of the High Court's order when it legislated Section 3 of the Act. Justice Bhagwati (for himself and Justices Krishna Iyer and Desai) had no difficulty in holding that as the judgment of the High Court was not brought for review at any stage, it remained in full force and must be "obeyed" by the Corporation (p.67).

The question was whether the law violated the fundamental right to property. The Court, first of all, determined that the right to receive the bonus was an "absolute right" of the employees under the settlement (p. 69). But if so, it became a chose-in-action: could it be as such acquired by the State under Article 31 (2) in view of the earlier decisions of the Court? The Court ruled that choses-in-action could be acquired because, such acquisition would not *always* be devoid of public purpose and *always* be directed at the augmentation of the revenues of the State, *which is not a public purpose* (p.75). For example:

> There may be debts due and owing by poor and deprived tillers, artisans and landless labourers to money-lenders and the State may acquire such debts with a view to relieving the weak and exploited debtors from harassment and oppression . . .by their economically powerful creditors. The purpose of the acquisition in such a case would not be to enrich the coffers of the State (p. 75).

This is a brilliant exposition, both at the level of legalism and responsive law making by the Court (*see* pp. 72-77). But does this logically mean that Parliament through that Act could take away the absolute right of bonus through a settlement? The Court says an emphatic "No". Why?

It says "no" to the State's claim that this could be done because

> the extinguishment of the debt of the creditor with the corresponding benefit to the State or State-owned/controlled corporation would plainly and indubitably involve transfer of ownership of the amount representing the debt from the former to the latter (p. 81).

And:

> Where by reason of extinguishment of a right or interest of a person, detriment is suffered by him, and a corresponding benefit accrues to the State. . .the question would always be: who is the beneficiary of the extinguishment of the right or interest effectuated by the law? If it is the State, then there would be transfer of ownership of the right or interest to the State, because what the owner of the right or interest would have lost by reason of the extinguishment would be the benefit accrued to the State (p.80).

Hence, the acquisition of ownership of proprietary interest over the assured right of bonus cannot be said to be for public purpose but only for the purpose of augmenting the revenues of the State which is not a public purpose under the Constitution. If it were to be held otherwise, the State can by law acquire "debts due to State" like the annuity deposits or the provident fund (p.76).

Justice Bhagwati had concurred with Justice Krishna Iyer in *Reddy*; Justice Krishna Iyer now concurs with Justice Bhagwati in *Pathak*! Justice Krishna Iyer in *Reddy* had categorically stated that the Constitution authorizes State acquisition to serve the needs of "a public corporation" and to answer "a community requirement" (p. 502). Justice Krishna Iyer does not file a concurring note explaining the differences between the situation in *Reddy* and *Pathak*. It could be argued that workers' rights to bonus ought to be recognized as a mandate of the Directive Principles and therefore their acquisition by law is violative even of the broad public purpose competence conferred by the Court to Parliament in *Reddy*. But this would have required a defence, in socio-economic terms, of the right to bonus, which is of course only available to the organized labour and not to unorganized and agrarian labour, which forms the bulk of the "working class" or "toiling masses". There would clearly

have been difficulties here. The best thing was to forget that *Reddy* said so many different things and to revive *Reddy* and reconcile it to *Pathak* on a future occasion, if that occasion ever arose. Those who urge the Court to adopt neutral principles in constitutional adjudication may take note of the fact, to them unpalatable, that the Court will not easily countenance the loss of its power to do what it thinks is "substantive justice" in *some* cases. Nor would it surrender its prerogative to attain institutional accommodation in some others.

There is a time for manifestos and a time for issuing "appropriate commands" and there is no known zodiac type configuration which will enable us in advance to determine which time is propitious for manifesto and which for command. The Court does not readily make available to people its own astrological chart.

Why did the Court invalidate the Act and even warn against "legislative strategems" to frustrate the fundamental rights? The answer is simple. The Court took upon itself the task of correcting what it regarded as an "emergency excess". The judgment of the Court begins by characterizing the Act as an "unusual piece of legislation" enacted at a time "when there could be hardly any effective debate or discussion" even in a matter like a "solemn and deliberate" settlement arrived at between parties (p. 59). It ends by asserting, rather vividly, that the "Courts should be ready *to rip open such strategems and devices*" which "trenches upon fundamental rights" (p. 81 : emphasis added).

But the Court overlooked that the Attorney-General was briefed by the State to defend the emergency legislation. If the new Government regarded the measure as an emergency excess, it was surely possible for it to seek the repeal of the Act. There might have been opposition to this in Parliament but surely not of an insurmountable character. Here was a successor Government defending what the Court thought was an emergency excess. If the argument was that fundamental rights to property must be protected, at least in situations like the present, this could have been met by the resources the

justices had themselves raised in *Reddy*. In fact, *Reddy* might have influenced the Government's resolve to contest *Pathak*, although it is strange that the Attorney-General did not himself place reliance on it: but somewhere along the legal-bureaucratic channels, *eddy* must have been urged as indicative of the Court's thinking. In any case, the Government did not have much time to evolve a satisfactory policy on the bonus issue. Groups traditionally denied bonus—like the railway workers —were already putting forward their demands vigorously. It is understandable that the Government thought that by contesting *Pathak* it might be helped by the Court to at least buy some more time.

The Court could have held that the Calcutta decision should at least be honoured and that would have carried the second year of the settlement period. Then if it had gone on to sustain the legislation, the new Government would have been left with the question of only one year's bonus which it could have merged with the more pressing issue of evolving a national policy on bonus. The interest of both sides would then have been protected to some extent. It should also be recalled that the settlement provided for bonus to Class III and IV employees of the LIC for the period 1974-77, and that the Payment of Bonus Act, a permanent statute, excludes the employees of the LIC. So that what was involved essentially was the protection of the settlement of bonus for a one year period.

I do not know whether this was "progressive interpretation" or if it ever suggested itself to the Court. It should have. Why then in the very last days of Articles 19 and 31 property rights, did it choose to rely so insistently on provisions which were in the process of demise? If you put the question this way, the answer becomes simple. It relates to the search for political legitimacy by the Court. The working classes are ensured that the Court is their ally and would go so far as removing singlehanded what it perceives to be an emergency excess. It also ensures the salaried classes that their provident fund and annuity deposits are safe from legislative "gobbling up". And intellectuals and lawmen can scarcely complain when the Court helps the Class III and IV employees of the LIC to get

their bonus under a settlement. And, for the future, the Court suggests that no matter where you place property rights in the Constitution, judicial interpretation, *Reddy* notwithstanding, will save certain forms of property from acquisition, although legally this might be a little more difficult to achieve with the abolition of Articles 19(1)(*f*) and 31. The point is that the Court's power to do substantive justice remains unimpaired. And the Court remains free to play its rightful role in the *politics* of human rights in India. Not at all a bad decision, I would say.

J. MUSTARD OIL IN THE NINTH SCHEDULE: OIL OVER TROUBLED WATERS!

Ours is the only Constitution, Justice Hidayatullah said in *Golak Nath*, which needs protection against itself! He was of course referring to the nefarious Ninth Schedule which validates or protects Acts and Regulations there mentioned from judicial review on the ground of violation of Articles 14, 19 and 31. In *Kesavananda* the question was squarely raised as to whether the Twenty-ninth Amendment seeking to insert seventeen more laws into the Ninth Schedule was valid. All the justices agreed that the Ninth Schedule device was valid as it has been held valid since it was enacted. They felt that it was too late in the day to question the validity of the Schedule or even to confine its scope to matters related only to Article 31A. But on the applicability of the basic structure limitations to the Acts thus sought to be incorporated in the Schedule there was a striking difference of opinion. Six justices led by Chief Justice Sikri (Justices Shelat, Grover, Hegde, Mukerjea and Reddy) felt that if the Acts affect any aspect of the basic structure or the essential elements of it, the purported insertion of such Acts could be invalidated. On the other hand, seven justices (Justices Ray, Palekar, Khanna, Mathew, Beg, Dwivedi, and Chandrachud) held that the entire amendment was valid. To their minds, no question arose as to whether specific legislations under the amendment should be subject to any further scrutiny. Justice Khanna's vote on this occasion favoured the views of the justices led by Ray, J. These six justices were entitled to hold as they did because they in any event did not subscribe to the notion of limitations

on the amending power. But Justice Khanna did: his agreement with these six justices introduces a vital element of tension, if not contradiction with his own position on the basic structure where he is broadly on the side of six justices led by Sikri, C. J.

In any event, the treatment of issues raised under the Twenty-ninth Amendment is rather cursory and old precedents before the advent of *Golak Nath* are somewhat mechanically applied. The learned justices appear virtually exhausted when in their opinions they turn to this vital issue. Their unanimous holding that just any law could be incorporated in the Ninth Schedule, because earlier justices in rather different contexts had said so, was a costly mistake. Or one may describe it more clinically by saying merely that it was an exercise in institutional accommodation. The argument that it is too late in the day to examine the validity of the device of the Ninth Schedule is only a dignified way of saying that the Court was not terribly keen to put too many restrictions on the power of Parliament. This sort of argument does not even draw the support of the pains-taking notion of acquiescence developed seminally by Justice Hidayatullah in *Golak Nath*. It is rather an assertion of judicial fiat: 'Please do not bother us now about this matter; we are all a bit too tired to write reasoned essays on everything'. Such attitude just cannot stand the test of time and the rather traumatic experiences of the changeful Ninth Schedule. The insertion in the Schedule of the MISA, and the Representation of the People Act had fundamental consequences for the Court, and the Nation in its emergency period decisions.

I had urged during the discussion on the Forty-second Amendment and in the early phase of the discussion on the post-emergency agenda of constitutional change that some way be found to proscribe the insertion of any further legislation in the Ninth Schedule. But this suggestion was not seriously entertained by either government. Nor is it likely that in the future any government would want to touch the Ninth Schedule. The Schedule is more than a symbolic assertion of the supremacy of Parliament over the Court in the arena of the protection of vital fundamental rights. In this kind of impasse, it is only

natural that the Court may be asked to change the Constitution by reversing its earlier positions. It was successfully persuaded to do so both in *Golak Nath* and *Kesavananda*. We have now pending before the Court a challenge to the validity of the Schedule as such. We do not know which way the Court will turn but an open discussion of the matter is at the present impossible because of the colonial doctrine of *sub judice*. I believe that in matters of constitutional adjudication, the doctrine should have no application or at best a very limited one since judges ought to have freer access to juristic talent than is now available at the Bar. But this is another theme, warranting fuller analysis in another context.

In any case, it was to be expected that the post-emergency Court will view the Schedule powers somewhat restrictively. The Court had already held in a number of cases that an amendment to a parent act enjoying the immunity of Ninth Schedule does not derive any immunity for that reason: it has also to be brought within the Ninth Schedule by an appropriate amendment to the Constitution (*see* the decisions cited in *Godavari Sugar Mills* v. *S. B. Kamble*, (1975) 1 SCC 696). Of course, there were decisions also indicating the contrary! (e. g. *Vasantlal, Latafat Ali Khan*).

In *Prag Oil Mills*, the mustard oil control order issued on September 30, 1977, under the authority of the Essential Commodities Act (which was put in the Schedule by the Thirty-ninth Amendment) was defended by the Union on the ground that the Order itself enjoyed derivative immunity of the Ninth Schedule. Section 3 of the Act authorized the Government to provide for price control of any essential commodity. Under this power, the Government through the Order fixed the price of mustard oil at Rs. 10 per kilo, exclusive of the container but inclusive of the taxes. The dealers and producers of mustard oil challenged the Order as violative of their fundamental rights under Articles 14 and 19(1)(*f*). The Court could only reach these last issues if the Order was held not to enjoy the derivative immunity of the Ninth Schedule. While the petitions were dismissed on November 23, 1977 by a unanimous order, the reasons came in two instalments. Justice Beg gave his

reasons on February 21, 1978, a day before his retirement as the Chief Justice of India and Justice Chandrachud gave reasons for himself (and Justices Bhagwati, Fazal Ali, Shinghal and Jaswant Singh) on May 5, 1978. In the circumstances, Chief Justice Beg of course had no access to the detailed elaboration of differences of opinion on the Bench. It is interesting to know that even by the time he wrote his opinion the Order had already been withdrawn by the Government! In the circumstances, the opinion led by Justice Chandrachud is important primarily as the Court's articulation of the view that the Ninth Schedule would henceforth be construed strictly to give Portia-like protection only to "Acts and Regulations" but not to Orders under the Acts and Regulations because this was not what Parliament wished to do on the plain text of Article 31B.

Justice Chandrachud said in justification of a restrictive interpretation of Article 31B that that article "constitutes a grave encroachment on fundamental rights" even though it may seem "inspired by a radiant social philosophy". The device is basically subversive of judicial review and fundamental rights "cannot be permitted to be diluted by implications and inferences". The fundamental rights may, what is more, be eroded by applying to the orders under the Act the same immunity without at the same time really according any respect to Parliament. This is because Parliament has an opportunity of applying "its mind" when a constitutional amendment expanding the Schedule is before it but in case of orders it had no such opportunity. Moreover, the executive cannot be said to have the power to modify the Constitution in exercise of its delegated law-making authority. Nor, says Justice Chandrachud, can we assume that the executive in the exercise of this authority acts "within the framework of the statute and within the permissible constitutional limitations". Experience, he says, "just . . . does not justify and to some extent falsifies" this kind of assumption. He concludes: "In fact, the upholding of laws by application of the theory of derivative immunity is foreign to the scheme of our Constitution": accordingly, orders and notifications under the protected Acts and regulations must "meet the challenge that they

offend against the provisions of Part III of the Constitution" (p. 486).

Chief Justice Beg agrees that orders and notifications are not in terms protected by Article 31B. But to conclude from that that the orders must meet the challenge of Part III is, according to him, going too far. The orders themselves are made in exercise of powers given under a statute. While the protection given to the statute does not extend to the order, it does extend to the power, given by the statute, to issue such orders. If this were not so, protection of powers through that device is rather irrational: "powers are granted or conferred so as to be exercised and not to be kept in cold storage" or as "exhibits" for "display" in a "show case". So that when the Act conferring the power is protected, what is protected is their use. This kind of derivative immunity does not mean that the orders are beyond judicial scrutiny but only that the scrutiny extends to ascertaining whether they conform to the authority of the section under which they are issued. Justice Beg concedes that orders passed before the inclusion of the Act in the Schedule may not enjoy derivative immunity (pp. 474-76).

But the Court rules that "having won the battle on a point of law, undoubtedly of public importance, the petitioners have to lose the war of price-fixation" since they have been unable to substantiate their pleas that any of their fundamental rights were violated. Article 14 was not violated as "producers" and "dealers" in mustard oil constituted a class by themselves. There was "no reliable data to support the contention that the classification was over-inclusive" (p. 489). The price of Rs. 10 per kilo of mustard oil was not "patently unreasonable" (p. 492); the argument that the "fairly large margin of profit for the middlemen", particularly for smaller mills was unreasonably affected so as to strike at the root of the right to do business was also negatived on the ground that the petitioners cannot be conceded the right to carry on business "as they please, mostly in a traditional manner, regardless of its impact on public interest". "Property rights are not absolute", Justice Chandrachud declares, compared with the "right of the public that such rights be regulated in the common interest" (p. 497).

The argument that the order may continue indefinitely so as to tinge it with arbitrariness was also not acceptable because the Court felt that as the supply position improves the price control may lose its rationale, as indeed happened in this case. Nor did the Court agree that for such an order to be reasonable it should not just fix the prices of the finished product but also a ceiling on the price of the raw materials. The Court pointed out that in this case the price of the raw material had also come down by sheer operation of the laws of the market. Refusing to convert itself into a price-fixation tribunal, the Court observed:

> The interest of the producer and the investor is only one of the variables in the "constitutional calculus of reasonableness" and Courts ought not to interfere so long as the exercise of Governmental power to fix fair prices is broadly within a "zone of reasonableness" (pp. 498-99).

Prag illustrates the doctrine of preferred freedoms which has increasingly found favour with the Court (see Baxi, 1978: LII-LXII). It also illustrates a welcome tendency on the Court to examine economic materials wherever necessary to the decision. What is striking, however, is the manner in which the Court upholds governmental action. The restriction of the Ninth Schedule is here presented as consistent with the very spirit of the First Amendment which brought into being Article 31B and the Schedule. Moreover, the restricted approach to the interpretation of the Schedule is projected as a *respect for Parliament in its unequal relation with the executive, to whom it has to keep delegating vast legislative powers*. Neither the Government nor Parliament can reasonably object to this, unless they are persuaded by Justice Beg's objection that this would result in putting the power in cold storage or in the showcase. Even if Parliament were disposed to do so, it cannot negate the Court's holding effectively as it would have to amend the Constitution almost every week, if not daily, to include orders and notifications under the protective umbrella of the Ninth Schedule. The only way it can obviate this difficulty, if it is seen as such in the first place, is to amend Article 31B so as to include all subordinate legislation within its already broad reach. But in that case the Court may revive the

themes of *Kesavananda* where six justices held that every insertion in the Schedule must be tested on the anvil of the basic structure. Justice Chandrachud has already subtly shifted his own position now : in *Kesavananda* he did not feel so strongly that the Ninth Schedule and Article 31B constitute a "grave encroachment" or threaten "erosion" of any significant content of fundamental rights. In any case, all the other justices who shared his view on *Kesavananda* have since retired and, as noted earlier, there is hardly any reasoned elaboration on that issue to persuade the post-*Kesavananda* justices that what was there held by majority is necessarily a better view. In a sense, therefore, the possibilities of *qualitative* expansion of the Ninth Schedule (in terms of categories of legislative actions to be protected) now stand substantially reduced. The next task before the Court is that of reduction of the *quantitative* expansion of the Schedule. I believe that the Supreme Court of India is one of the very, very few institutions in India which has gained in social learning arising from the experience of the emergency. And the possibilities of perversion of the Constitution through the limitless recourse to that device is one of the striking lessons of that period. The Court has before it the intransigent fact that even the Forty-fifth Amendment wishes to perpetuate the Ninth Schedule device for the future, despite touching protestations concerning the respect for judiciary by the present regime and despite the "abolition" of the right to property. The Court must attempt to emasculate Article 31B power step by step. In their humility, justices might say that the "Court is not the only sanctuary" against governmental lawlessness. But the nagging political realities of India must continue to alert the Court to its role-obligations as the last sanctuary against tyranny of the majority.

The decision in *Prag* also illustrates that except when the law so requires it, the government has the free-flowing and final power in the matter of price-fixing of whatever are, at any given point of time, regarded as essential commodities. Such controls would be regarded as reasonable restrictions on the rights under 19(1)(*g*) and (*f*). Except when the Act so requires, there in no duty imposed on the government to consult affected interests. The government may fix the price of an essential commodity without fixing the price of the raw material for that commodity. If the very organization of business activity suffers—for example, the intervention of the middlemen—that too must be borne as a cost of doing business in an essential commodity. And if smaller oil mills suffer as much through a global order as the bigger ones, Article 14 cannot just be called in rescue. The price control of essential commodities may have its technocratic rationale which will be readily accepted by the Court. The price control may be indefinite in duration ; presumably, even that would be validated by the Court on the principle of *Prag*. So that, for all practical purposes, there is no imperative need to give any Ninth Schedule immunity to orders, at least under the Essential Commodities Act. While the Court will not interfere with the political economy of management of the essential commodities, it does and will in the future legitimate the whole of it under the title of social interests of the consumer community.

While all this is all right at a very general level, it is also important to remember that this type of judicial legitimation enhances the already vast powers of the executive. As regards essential commodities, the validity of the law is protected from challenge on the grounds of Articles 14, 19 and 31 ; its legislative competence can only be attacked on the ground of excessive delegation. But the Court is slow to accept such a plea. The orders and notifications under the Act are of course open to judicial scrutiny but it is doubtful that affected interests can really show patent arbitrariness or unfairness on the face of the order, excepting in very few situations. Thus for all practical purposes those in the business of making and supplying commodities which are from time to time labelled as essential commodities are exposed to the full play of executive power. Their only source of relief is political recourse. If they have political power or influence and they are effectively organized, they can correct arbitrariness or seek justice at the party-political level. Or they can establish networks of patronage within the political sub-groups and the civil service. The ties between business and industry on the one hand and the political parties in power and bureaucracy on the other are further strengthened through this

kind of process. And this has its own consequences, one of which is that *the community is not always protected through the administration of the Essential Commodities Act.* And since consumers are not yet a well-organized political lobby having the same power as the business groups they are not able to exercise any initiative or control over the use of executive power for their welfare. As far as I know, the Act does not really provide any machinery for individuals or a group of consumers to set the processes of control of essential commodities in motion; nor does it provide any legal regime of rights and duties in this regard. I think there ought to be such a provision.

What I am trying to say here is that while the Court is basically right in its "hands off" policy in regard to broad economic policy determinations, *it must not presume that conditions in India really warrant the abstract claim that control of essential commodities is always, ex hypothesi, in the interests of the consumer or community at large.* Indeed, the Court itself concedes this in *Prag* when it speaks of experience falsifying to some extent the presumption that administration always acts in accordance with the authority of law. The citation of American judicial attitudes and precedents justifying a non-activist policy may not at all be relevant to the Indian context, for, both consumer and business groups there enjoy some level of significant influence on governmental decision-making. The degree of organized articulation of consumer interest in India simply does not bear comparison with the United States.

The Court cannot go about price-fixing: it is frightfully overburdened. On the other hand, to put it strongly, the whole rationale of its existence is that it is the one place where the cry of infringement of fundamental rights will be taken very seriously and earnestly. Organized business is not likely to come to Court very often complaining against violation of rights but when it does it is an indication of some instability or crisis in the business—bureaucracy and political parties nexus. If the Court altogether adopts a "hands off" policy, *the incidence of the vicious hold of certain combines of political power over the people gets reinforced.* Perhaps, the Court, while upholding the governmental power, should put its actions to more stringent tests of

public accountability by arguments and evidence before it particularly when the complaint is that the right to trade, profession or business of certain groups is affected. This is a difficult and sensitive task but it is almost as important as that of regulating the constituent power of Parliament. Perhaps, the best way for the Court is to offer some advice as to institutional form which would more genuinely balance the social interests of the consumers and producers and investors than seems possible by giving a *carte blanche* to the executive. One such piece of advice it can give, from time to time, is that Parliament consider creation of Prices Justification Tribunal, which will do the task of balancing. This would be a good suggestion, taking care of the structural problems to some extent. It could also offer advice that consumers should have some standing to activate, and render accountable, the executive for its performance or inaction. This can be done through the proposed tribunal or through appropriate amendments to the Act and related legislation. In any case, the requirement of consulting affected interests should be legislatively generalized, so as to include consumers and small business also.

You might contend that all this is not the Court's function. But it cannot be the Court's function to recognize and extend expansively the powers of the government through judicial restraint without at the same time ensuring elements of accountability, other than judicial control through fundamental rights power. *Grants of power must be accompanied by charters of accountability: I know of no other way in which the "rule of law" can be served.*

And if government can, from time to time, use the advisory jurisdiction of the Court to get around sensitive political issues, I see no reason why the Court may not from time to time use its contentious jurisdiction to advise and even admonish the government! You will say all this is politics. I would agree and go on to say that it is good politics and that we should have more of it in the Court. The creative role of the Court is always inescapably political, in a broad sense. And it is only the Court, in the India of today, which can take the effective leadership for organization, through such direction, of

what has come elsewhere to be known as the "public interest law". The Bar is singularly uninterested in any cause beyond formal litigation and security of the profession. Other groups in society which are more socially responsive can do much better if the Court ventures to make constructive architectural suggestions for ordering the exercise of power and ordaining specific forms of accountability, even when understandably it does not itself desire, except in the last resort, to burden itself with determination of all matters affecting national polity. Indeed, this last factor is a further reason why the Court should, from time to time, include in its decisions new ideas and even direct appeals to social groups for political action to preserve the imperatives of power and accountability. Such well-considered moves on the part of the Court will add to a source of legitimation for many incipient social action or public service groups in India today. The supreme role of the Court is to attain a diffusion of the rule-of-law consciousness among the people. The post-emergency Court has begun well in this direction. It will sustain its role better if it frankly focuses on Indian realities rather than the received wisdom from the nine old men of the United States.

K. THE CRISIS OF CREDIBILITY AND THE POLITICS OF HATE

There were at least three distinct occasions on which the Court, after the emergency, had to provide reasoned elaboration on the notion of the independent judiciary and the dignity and status of its apex Court. The first occasion was provided by the undignified and unhappy controversy concerning the appointment of a new Chief Justice of India. The retiring Chief Justice of India took offence and sought to prevent any further development of the controversy by use of contempt power in *Sham Lal*. The second and related contempt proceeding in *Mulgaonkar* concerned the proposal pertaining to a Code of Conduct for Judges. The third occasion was provided by the appeal relating to transfer of judges during the emergency. All these occurred during the Chief Justiceship of Beg. The fourth occasion was provided by arguments in the reference on the Special Courts Bill.

The regime of Chief Justice Beg was a fairly eventful one. On two occasions the Chief Justice issued, through the Registrar of the Court, official *press* releases. One related to the Code of Conduct affair and the other sought to refute Justice Goswami's comments in his opinion concerning the possible impropriety in the Chief Justice's meeting with the Acting President and the urging by him of the brother justices to expedite the reasons in the dissolution case (*see* Baxi, 1978) ; Chief Justice Beg did not find much support from his brethren in the contempt proceedings, both of which had to be discharged. There were clear indications that brother justices did not accept the leadership of Chief Justice Beg. The Court almost ceased to be an institution and became an assembly of individual justices.

In Chief Justice Chandrachud's first year in office, as was to be expected, the Court began regaining its corporate identity. But his assumption of office was preceded and followed by some extra-judicial controversies. One concerned the anguished statement, which has been much misinterpreted, by the Chief Justice himself that while he was convinced that he had no other choice but to decide as he did in *Shiv Kant*, he wished he had the moral courage to resign after having given that decision. Justice Chandrachud's elevation was preceded by an extraordinary controversy regarding the so-called supersession of judges in the appointment of Justice D. A. Desai in September 1977 ; it was accompanied by controversy over his decision in *Shiv Kant*. Barring the Special Courts opinion, judicial utterances occurred in the context of a highly charged atmosphere. Indeed, right up to the Special Courts opinion justices of the Court engaged in the important task of clarifying the judicial role and the notions of independence of the judiciary. Paradoxically, the Court did so, on all the four occasions specified above, in situations permitting very few possibilities of generating binding law. In strict theory, even the transfer case may amount to a massive, though important, judicial dicta ! Overall, the Court had to combat the projection of a rather aggressively distorted image of its role during the emergency. Through these various pronouncements, the Court sought to engage the attention of people that the images put across to them were distorted

and distorting. And the Court backed up all this by a wide-ranging cultivation of a large number of communication-constituencies through its daily decisions. The search for new legitimacy thus involved some defensive, rearguard action as well as some positive, activist assertions of judicial power to the task of public good. Before we go to the decisions, let us first look at the controversy surrounding the appointment of the new Chief Justice and the significance of his extra-judicial statement concerning his own role in the emergency. We will not discuss here the contempt cases nor, in any detail, the 'supersession' controversy over the appointment of Justice D. A. Desai to the Court, as these have been ably dealt with already by my colleagues (*see* Dhavan and Balbir Singh, 1979; Dhavan and Jacob, 1978).

The debate over the appointment of the Chief Justice of India was preceded by the storm over the elevation of Justice D. A. Desai to the Supreme Court. The gist of the claim there involved was that he was not the seniormost judge of the Gujarat High Court and that senior justices of High Court should not be passed over when their claims to elevation were at least as strong as the judge who was elevated. This was a proposition of first impression as there was no convention in regard to the appointment of judges from the High Court to the Supreme Court; nor was any such convention ever insistently suggested by the Bar. The Gujarat Bar was perhaps exercising its collective right of freedom of speech and expression when it passed the resolution expressing its disapproval of the appointment of Justice Desai and "warning" the Government not to by-pass senior justices in the future. It was also well within its rights when it decided to "strike" on the very day Justice Desai was being sworn in at New Delhi. Justice J. B. Mehta, who wrote a fine opinion in the transfer case, decided to resign at his being "passed over".

But the Advocates Association went much further than expressing its protest. The Association attacked by name the previous Chief Justice of their High Court: the resolution said that it "shrewdly suspects that the recommendation was largely, if not solely, influenced by Mr. Justice Bhagwati" whose opinion it found "surprizing and shocking". It at no stage condemned the insinuations made by a politician of Gujarat, of "nepotism" and the attribution that Justice Bhagwati was aspiring to become the next Chief Justice of India (*see* for a fuller account and analysis, Dhavan and Jacob, 1978 : 21-33).

These attacks represent, in essence, the factional politics of the Bar. But if the politics of the Bar permitted such attacks, the politics of the Indian judiciary, at the appellate level, also prevented any cogent response by the judges. There was no meeting of Chief Justices or of all appellate court judges, no outcry from media that such tactics were unbecoming to the Indian Bar. Indeed, even the Supreme Court Bar Association passed a resolution strongly disapproving the elevation of Justice Desai at the cost of "disregarding the superior claim of the more senior High Court judges including the present Chief Justice of the Gujarat High Court". No judges of that High Court, including the Chief Justice, made any public protest at the undignified tactics of the Bar. One would have thought that the justices of the Gujarat High Court might have protested at the collective lowering of the public image of the judiciary by the reckless attack on the integrity of one of their own brethren. This latter suggests factionalism in the High Court as well.

In any event, there was some movement to establish the "seniority" principle in Parliament for the appointment of the Chief Justice of India when P. K. Deo, an independent member, moved in the Lok Sabha a private member's bill to that effect. The Bill was withdrawn after some discussion, which appears as varied as it was inconclusive. Not much public attention was focussed on it and the Bombay group which was to issue a memorandum on the eve of the appointment of the new Chief Justice made no major event out of this, in terms of public debate and opposition to seniority principle in early December 1977 (*see* Dhavan and Jacob, 1978 : 107-09).

The authors of Bombay memorandum concerning the appointment of a successor to Chief Justice Beg in late February were all eminent persons, motivated by the highest degree of dedication to the values of democracy, rule of law, freedom and

independent judiciary. From such persons, the nation was entitled to expect sage counsel, not unbalanced or biased assertions of opinion. The memorandum exemplified however, that we as a nation learn little from national catastrophe and catharsis.

The arguments of the Bombay group were unsophisticated; so were its tactics. The date of the retirement of Chief Justice Beg was surely not unknown to them: why did they choose the eleventh hour to appeal to the Government to revise the policy on the appointment of Chief Justice? What prevented this very distinguished group from initiating a national debate on such a vital matter earlier? To release a press statement more or less on the eve of the appointment of a new Chief Justice was to resort to somewhat undignified pressure tactics allowing no reasonable scope for the national debate. Should our leading lawmen have resorted to such tactics?

The underlying attack on the integrity of some justices was also very unbecoming. Two insinuations are noteworthy: Justices Chandrachud and Bhagwati are not upholders of individual's liberties (because of their *habeas corpus* decision) and that they are "committed" justices, a part of a "hierarchy so arranged that the seniormost sitting judges would outlive all other sitting judges of the Supreme Court, many of whom have unexceptionable records".

Both these allegations warrant a close look. Anyone who has a reasonable familiarity with the decisions of the two justices would know they are also committed to the values of individual liberty, despite their decision in *habeas corpus* case. A careful reading of their opinions in that case (despite the quilt quotations in the Bombay memorandum) also testifies to their genuine concern for freedom. The fact that they came to a different conclusion than what we would have expected from them may be a matter of *shock* but could hardly be a ground of *supersession*.

The authors of the Bombay memorandum may have felt justified in denouncing the judgment in the *habeas corpus* case, but they were wrong in attacking individual justices for their

opinions, howsoever unpalatable and tragic the events surrounding and following the judgments were. It was for the Bombay group to persuade the nation that these justices acted wholly erroneously in law in giving their opinions, that the view taken by Justice Khanna was the *only legally* tenable view that could have been taken. If this were demonstrated cogently, no more argument of extraneous nature would be needed in advocacy of their cause. The Bombay group, in a manner ill befitting renowned jurists, instead preferred the path of emotional exploitation in urging the supersession of the two justices.

This is clear because while the memorandum castigated the two justices, it preferred to overlook the overall context of the *habeas corpus* decision. It is worth recalling that in the teeth of the imposition of the emergency the Supreme Court in *Indira Nehru Gandhi* case (by a 4 : 1 decision) invalidated certain provisions of the Thirty-ninth Amendment, inflicting in the process some loss of national and international legitimacy for the regime. As noted previously, Justices Ray, Mathew and Chandrachud, who in *Kesavananda* conceded Parliament's unlimited power to amend the Constitution, voted to negative the very exercise of the power thus granted in that case. It was in this context that the abolition of the Supreme Court was being seriously proposed and considered. The substitute device was a constitutional court nominated by the Indian President comprising two members each from Parliament and a "college" of judiciary, with a generous sprinkling of the executive nominees. Only future historians of India can record the impact of this macabre climate created by an authoritarian regime. Should the Court have committed self-immolation by yet another, and total, confrontation with the regime, leaving people entirely at its mercy? Or should it have endeavoured to survive, seeking to play a role as a centre of some kind of political opposition at a little more opportune time?

A similar kind of question haunted many people and groups, who held decision-making power (such as ministers, top bureaucrats, leaders of professions, social organizations, media and universities). Each set of people made its own decisions.

Some preferred the martyr style, some sought to generate and sustain small centres of opposition, some capitulated.

One does not know whether the Court saw the problem in these terms at all. Even if it did, citizens are entitled to ask whether the *Supreme* Court should have permitted itself such an institutional accommodation with Parliament and Executive at such a critical juncture of Indian history.

How did the Bombay group address itself to these tasks of reconstruction of democracy from its debris? It seeks to discharge its serious responsibilities by calling for the appointment of Chief Justice from amongst judges and lawyers with "unexceptionable records". By "unexceptionable records" is clearly meant judges who have in the *habeas corpus* cases decided in favour of the citizen. Most justices of the Supreme Court would not meet the rigorous test of the Bombay group for the simple reason that they got no opportunity to demonstrate their preferred positions. The Constitution Bench consisted of five seniormost justices; how can one find the type of "unexceptionable" record for the remaining justices? Therefore, the Bombay group must be understood as saying: 'The Chief Justice of India should be selected from those judges of the High Court who ruled in favour of the citizen in the *habeas corpus* cases during the emergency'.

This "advice" had alarming implications. It entailed not merely the supersession of the two named justices but of all justices who have been appointed prior to March 1977! There is, logically, no way out of this impasse, given the Bombay group's criterion of preferring judges with "unexceptionable records". How can we say what positions the remaining judges would have adopted had they participated in the actual decision?

Surely, if the Government has adopted a convention of supersession, so have the affected judges adopted that of resigning their positions. So far, all "superseded" judges of the Supreme Court have resigned. What assurance did the Bombay group have that the entire body of justices appointed before March 1977 would not have resigned if superseded?

Despite all the sophistry of Mr. Chagla, the demand of the Bombay group amounted to a call for supersession. Mr. Chagla went so far as to appeal to J. P. and the Prime Minister to "raise their voices against what might be considered as a national disgrace" in the possible elevation of either of the two judges to the position of Chief Justice. Such an appeal, based as it was on the logic of supersession and ideology of intolerance, was in itself an act of "national disgrace".

The Bombay group's memorandum represented another incarnation of the notion of "committed judiciary", although in itself it is devoid of much clarity on the nature and scope of the commitment. Indeed, the 1973 controversy was a meaningful one, as despite vehement emotional denunciations it was possible for all points of view to emerge at an intellectually coherent level. By contrast, the Bombay group's memorandum was more of a visceral reaction.

The point, really, is not intellectual coherence. One can only understand the Bombay group's action at the level of emotions. It was an act of catharsis. In the aftermath of the emergency there appeared no basis of rational dialogue between those who *overtly* suffered in the emergency and those who did not *so* suffer. There was, and still is, the feeling that those who did not expose themselves to torture, detention or exile were moral cowards and traitors to democracy. There was a moral absolutism, and still is, which led to the conclusion that if one did not oppose the emergency, one indeed supported it; a tendency which was also prevalent during the emergency. At that time the regime said: 'If you do not support us, you must be our opponents'. In neither period was there any middle ground, whereas the reality was far more complex. I think that the emergency generated four styles of response. Some were genuinely committed to the emergency, and even if they felt that some features of it were obnoxious, they felt that it was not an unmixed evil. The other style of response was precisely the opposite: here, the emergency was regarded as an unmitigated evil and one had to oppose it at all costs. The first group was the "committed" and the other the "martyr" group. But then there were people who, for fear or some other reasons,

became silent overnight: they had "nothing" to do with "politics" between June 25, 1975 and March 22, 1977. These people embodied a "retreatist" response. And then there was the last style of response which for the lack of better expression I call "eclectic": these people spoke on individual issues and judged them on their merits, without any evaluation of the structure of polity, and in the light of the information they then possessed.

Upon the restoration, the martyrs were justified and the committed ones derided and despised. The retreatists were now back in business judging everyone on a morally absolutist premise. They said and did nothing *then*; so they could say and do anything *now*. Their record was not just clean; it was a bit *too* clean. It is the eclectics who came in for very sharp attack by all the three groups. Those committed to the emergency felt that the eclectics were now having it both ways. The martyrs could stomach retreatists but not eclectics. And retreatists now found it possible, with their clean records, to attack the eclectics for their "unclean" ones: the committed were much less easier targets for them.

This was the intellectual ethos or communicative field created by sheer force of events in the first year of the new regime; unfortunately it persists even today. It is in this ethos that people were judged: everyone asked the eclectics "what did you do in the emergency?". I cannot pursue the wider theme here. But I do want to point out that the justices of the Supreme Court fell victim to this kind of atmosphere. Justices were in no position to take a retreativist stance: they had to decide. If they resigned, others would fill their places but they would have to decide too. They clearly had the choice of committing themselves to the "values" of the emergency or to oppose them or still to pick and choose in a responsibly eclectic manner.

True it is that some High Court justices and Justice Khanna played the martyr role. They were complimented by the whole nation and also by their brethren on the Supreme

Court. Justice Chandrachud used these memorable words to salute their courage and integrity in the transfer case:

> The ink on recent history is still not dry and its pages contain a tribute to the gentlemen standing in black robes who, though small in number, championed public causes with a courage which dumbfounded even that world in which Martin Luther King and Lord Coke had lived and died. In fact, the missionary zeal of Mr. Seth's counsel (Seervai) is by itself enough assurance that Judges in distress, in their unequal contest with the executive, will not fail to receive the attention of the illustrious at the bar (pp. 218-19).

This is a warmhearted and noble tribute, the like of which is not easily to be found in the annals of modern judicial thought.

There were, of course, committed justices who have not escaped the wrath of the martyrs, retreatists and eclectics. But it is justices like Chandrachud and Bhagwati who have had to pay a heavy and silent toll for their eclectic stance. They did not, or could not, choose martyrdom. They did not, or could not, choose the path of unreserved support for the emergency. They decided to do the best they could, given the "unequal contest with the executive".

The politics of hate and intolerance has no place for such men. All such men who publicly dared to say that they lacked the omniscience to decide what was ultimately the right course for them in their sphere of work, and who condemned what was bad and applauded what they saw as right, are for a long time to come to be condemned by the politics of hate and intolerance that still pervades India.

It was this kind of atmosphere in which Chief Justice Chandrachud was led to say what he did about his lacking the moral courage to resign *after* he delivered the *Shiv Kant* opinion. Every one has, in the prevailing atmosphere, forgotten the first part of his statement that he could not have decided in conscience other than he did in that case. He did not quite appreciate that the post-emergency context was still not one of mature self-reflection in public and that it was still one of utter moral

absolutism. What is worse, even the cultivators of public opinion have taken his statement, and his subsequent actions, to depict a cruel caricature of the man and his work. I would quote just one example of the styles of denunciation prevalent in the post-emergency discourse. Arun Shourie has recently written this:

> Thus, we have our "leaders" and our "laws". We have our judges too. Judges represented at the top by a judge who one day upholds the fascist decision of a clique to deny six hundred and fifty million the right to *habeas corpus*, who the next day wishes he had the courage to resign rather than pronounce that judgment, who the day after addresses one of the principal culprits of the Emergency again and again as a "very responsible member of our society". [The reference here is to hearings on the Sanjay Gandhi bail case.] And readers send in "letters to the editor" complimenting him for having the courage to say that he had not the courage when he needed (p. 308).

Even the experience of the emergency has not yet taught the best of us that the only way we can preserve democracy is by the *dignity of discourse* and a tolerance for viewpoints other than our own. Dr. Shourie is a man of remarkable talent and compassion but it is hard for even such men to learn the lesson that divorce between freedom and responsibility is in itself a moral wrong and an invitation to tyranny. This then is the predicament of the post-emergency India.

L. ON THE TRANSFER OF JUDGES

The post-emergency Court had to deal with the appeal by the Union concerning the transfer of a Justice of the Gujarat High Court to the Andhra Pradesh High Court, as an aspect of the mass transfer of judges during the emergency. Justice Seth had complied with the transfer order and moved to Hyderabad. But the Gujarat High Court had voided the transfer, by a decision made on November 4, 1976. The Union filed an appeal to the Supreme Court, which as we have said earlier, did not get the right of way and came up as a routine matter for hearing and disposal in August-September 1977 *after* the retirement of Chief Justice Ray. The fact-situation giving rise to the litigation was already overrun by the course of events and by the time the matter was heard by the Government, the transferred justices were reinstated in their original positions. But the issues raised by the decision of Gujarat High Court were of fundamental importance in relation to the independence of the judiciary. The Union Government, despite its commitment to uphold the status, dignity and independence of the judiciary, decided to persist in its appeal because vital issues concerning the power of the President under Article 222 were involved. That article in its first clause provided that: "The President may, after consultation with the Chief Justice of India, transfer a judge from one High Court to any other High Court".

The decisions both at the High Court and the Supreme Court level, contain a whole range of exciting jurisprudential questions and are extremely important as judicial pronouncements on the conception of "the independence of judiciary". For the present purposes, we will only look at two issues: (*i*) Can and should Article 222 be read as requiring that the President should obtain the consent of the affected judge before making the transfer? and (*ii*) if such consent was not mandated by the article, can the nature of discretionary power exercised by the President be reviewed by the Court on the basis of the principles of administrative law?

Justice A. D. Desai held that Article 222(1) should be so read as to require the consent of the concerned justice before any valid transfer can be made by the President. On this issue, only Justices Bhagwati and Untwalia, dissenting from the majority led by Justice Chandrachud (inclusive of Krishna Iyer and Fazal Ali, JJ.) held that Article 222 should be so construed. On the second issue, the majority of the Supreme Court agreed with the opinions of Justices J. B. Mehta and D. A. Desai of the Gujarat High Court. Justice Bhagwati also agreed that the principle of "effective" consultation was absolutely vital in the exercise of Article 222 power. On this point, then, there is complete unanimity of judicial opinion between both the Courts

How did the various justices approach this last issue? Justice J. B. Mehta held that the consultation with the Chief Justice of India must be "effective" and "real" which meant that the principles of natural justice would apply in all their vigour, including "the minimum safeguard...to consult the Judge concerned at least at the stage when the individual is selected" (p. 1070). He explicitly held that as the petitioner was not "consulted or even informed of this proposal...as per the minimum requirement of natural justice" and as there was no material placed before the Court to show that there was any effective consultation with the Chief Justice of India, the transfer order of May 26, 1976 was invalid and *ultra vires* (p. 1075).

Justice A. D. Desai held that the scope of effective consultation meant that all the factors causing "public" and "private" injuries by the transfer must be specifically examined by the Chief Justice of India. Public injuries may result "due to the want of knowledge of the local laws, customs, regional languages etc." and through "the administrative difficulties" all this might create for the Court if the person transferred is, for instance, Chief Justice. Individual injuries to the judge may relate to the "education of children, social difficulties or obligations due to the fact that the wife may be serving an old parent who needs his personal attendance or special medical facilities, residential accommodation on retirement etc." (p. 1097). Also present was the fact that a transferred judge upon his retirement would not be able to practise in two jurisdictions. The consultation has to be "substantial" and for this end it is necessary that the President prescribe a procedure that was "effective" and provided the fulfilling of the "real purpose underlying the article" (p. 1097). The learned Judge also held that the power of the President is not in any case "unfettered": it has been conferred "to achieve a purpose" and the power can only be exercised in pursuance of that purpose and no other (p. 1103).

Justice D. A. Desai also held that in law conferral of discretionary power means not that a person in whom the power is vested may "do what he likes, but what he ought" to do. The

Chief Justice of India, upon consultation, has to keep in view whether any public purpose will be served by the proposed transfer, and what personal hardship may befall the transferee. And the "Chief Justice will have to keep in overall view that here is a transfer proposed by a litigant, of a Judge, who in discharge of his duty, might have displeased the litigant and that motivated by such collateral purpose, transfer is proposed, though the proposal is couched in such high sounding words as 'national integration' or 'strengthening of the judiciary' " (p. 1136). He further held that it would be "impossible" for the Chief Justice of India to have applied his mind to all the aspects "in the case of mass transfers" since a "meaningful" process of consultation would make his concurrence even with a single transfer proposal "really very difficult" (p. 1140). A meaningful consultation in the present case would have at least led the Chief Justice of India to point out that the proposal entailed the abrogation of a convention, at least a quarter of a century old, and that the transfer of one of the judges who had only nine months to retire did not serve any public interest. The transfer orders were not supported by any affidavit from the Chief Justice of India nor could the Union explain the rationale, in terms of public purpose, behind them. For this reason, Justice Desai held that no consultation had taken place as a matter of fact and this was enough to invalidate the order (p. 1140).

Justice Chandrachud was quite categorical that "consultation" with the Chief Justice of India was a condition precedent to the exercise of the power under Article 222 and that meant that all relevant data must be made available suo moto or upon request to the Chief Justice as this was necessary for deliberation which is "the quintessence of consultation". For this reason, policy "transfers on a wholesale basis" which leave no scope for careful deliberation of "the facts of each particular case" and which are "influenced by one-sided governmental considerations" are "outside the contemplation of our Constitution". Quoting Justices Krishna Iyer and Bhagwati in *Shamsher Singh*, Justice Chandrachud endorsed their view that the "last word in such a sensitive subject must belong to the Chief Justice of

India". He expresses the hope that "these words will not fall on deaf ears" (p. 229).

Justice Krishna Iyer, with whom Justice Bhagwati pointedly agrees, prefaces his observations by saying that the parties in consultation are "high-level functionaries and the impact of erroneous judgment can be calamitous". Therefore, the Chief Justice must have full access to information and materials from the President. What is more, he "must collect necessary information through responsible channels or directly acquaint himself with the relevant data", deliberate and "proceed in the interests of the administration of justice to give… such counsel of action as he thinks will further the public interest". But he maintains that "consultation is different from consentaneity"; the two dignitaries may "discuss" but disagree, they may "confer but may not concur" (pp. 267-68).

A bare review of the trend of opinion in the High Court and the Supreme Court indicates thus a consensus that consultation must be effective. But the operationalization of effective consultation seems to vary substantially in the two sets of opinions. The fundamental difference lies in the question of application of the principles of natural justice. Justice Chandrachud expressly disapproves of the view of Justice Mehta that some rules of natural justice may apply in the case of transfer, if "the due procedure" of "fair play" implicit in Article 222 was followed (p. 229). Justice Untwalia also appears to be against extension of the principles of natural justice to transfer of judges as this would lead to many "unpractical, anomalous and absurd results". The result he seems to have in mind is that this principle might proliferate "in other branches of service either under the Union or the States" (p. 278). He too feels that insofar as the Chief Justice of India gathers materials from all available sources in advising the President, no further question of application of other principles of administrative justice may arise.

This then is quite a serious divergence of views. In the instant case what was involved was arbitrariness of the Chief Justice of India who did not follow, it appears, any reasonable

procedure when the President "consulted" him. In such a situation, should not the application of the minimum principles of natural justice be insisted upon? Chief Justice Chandrachud of course leaves the way open slightly for this when he qualifies his statement on this point by the caveat that the procedure must be followed. But if neither the Union nor the Chief Justice of India files an adequate affidavit before any High Court where the question first arises, how is that Court to ascertain whether the due procedure was followed? As Justice Bhagwati puts it in unmistakable terms: "But we have seen that this power of transfer has been *abused* by the highest in the land and the *so-called* safeguard of consultation with the Chief Justice of India has proved to be of no avail" (p. 250: emphasis added). Justice Untwalia's observations fail to distinguish the crucial differences between "services under the Union or States" on the one hand and judiciary and higher judiciary on the other. If the two were ever to be equated, we might as well stop talking about the importance and independence of the judiciary.

Nor does the Supreme Court really highlight the vital emphasis placed by Justice D. A. Desai on the fact that all transfer proposals have to be deliberated in the context that the State is after all a major litigant and the only litigant possessing the power of transfer of judges, of its claims or counter-claims. This means something more than the possibility of "ulterior" motive or "collateral" purpose. It must also mean that the entire record of the judge under consideration for transfer must be perused by the Chief Justice of India in his deliberations. Justice Chandrachud concedes that punitive transfers are outside the contemplation of the Constitution; but the question is when can we term a transfer punitive? Can we do so without a total assessment of the work of a particular judge? Even jurimetricians, who have tried to quantify the voting behaviour of a judge in terms of, say, pro-Government and pro-citizen or pro-State and pro-individual traits, have to concede that their measurements are rather general. In other words, the Chief Justice of India would have to study in fairly precise manner the performance of judges under consideration for transfer. One cannot judge a judge by a few spectacular decisions that he is anti or

pro-government and that is why the transfer has been mooted. If it is arbitrary and vindictive on the part of the government to go on the basis of a few spectacular decisions then it is equally arbitrary for the Chief Justice to look only at a bunch of salient decisions of the judge to be transferred. If Justice Desai's argument is taken to its logical conclusion, it must lead to the conclusion that the State, being a litigant cannot just have the power to transfer a judge without his own consent as otherwise it can always be said on any partial assessment of the work that he is being transferred because he meted out some anti-government decisions in major matters. Actually, until the emergency and even until its second phase, the Government was not quite convinced that judges ought to be transferred without their consent; its conviction took root when the regime found that there might arise certain serious legitimation costs if they were not moved around a bit. Every judge, in the course of his activities, is bound to give this kind of feeling to every government and it is bound to be difficult, jurimetrics notwithstanding, to ascertain an unmixed profile of a judge in relation to the governmental exercise of power. The short point here is that if you start with the conception that the State, which has the power to transfer, is the largest litigant, then Article 222 has to be so read as to require consent of the judge who is to be transferred. It is difficult to understand how Justices Desai and Chandrachud are able to avoid this logical conclusion.

But they do and for a policy reason. And that is that there may be occasions when the transfer of a judge may, for any reason, be necessary for the efficient administration of justice. Justice Chandrachud instances the rare cases where "the factious local atmosphere sometimes demands the drafting of a judge or a Chief Justice from another High Court". And he speaks of "the rarest of rare occasions which can be counted on the fingers of a hand" where it may be "necessary to withdraw a judge from the circle of favourites and non-favourites" (p. 220). Justice Krishna Iyer interprets Article 222 on its own text without dilating much on this aspect of the matter; but there is nevertheless a startling observation that "policy-oriented transfer of judges after compliance with constitutionally spelt-out protocols may not be ruled out" (p. 264). He, *for once*, refuses "to rewrite the Constitution" so as to require consent (p. 273).

Justice Chandrachud's reasoning is well met by Justices Bhagwati and Untwalia. If the problem is confined to the "rarest of rare cases", which can be counted on fingertips, Justice Bhagwati urges that we have to choose the lesser evil. It is necessary, he says, to put up with such a judge wherever he is located "in order to secure the larger good which flows from the independence of the judiciary" (p. 249). And Justice Untwalia feels that the potentiality of such events must be dealt with in a manner consistent with the independence and the dignity of the judiciary. For example, public interest in the administration of justice and in the proficiency of the judges may "well be achieved at the time of initial appointments" (p. 279). If certain problems might still arise, he speculates that a Committee or Tribunal might be established to handle expeditiously the grievances of transferees. To this point Justice Chandrachud says with great egalitarian fervour that litigating judges must operate with the legal system as they find it (p. 218)! But the core point is not about egalitarianism! Certainly in other matters not directly involving the independence of the judiciary, litigant judges must queue up with other litigants. But transfer of judges raising as it does matters of moment for the structure of the judiciary needs to be handled expeditiously. In any event, Justice Untwalia mentioned the device of the tribunals only in passing since his main conclusion was that Article 222 should be read as to imply, necessarily, the consent of the transferee judge.

Justice Krishna Iyer's observations, read with his conclusion that consultation does not mean *consent* of the Chief Justice, raises indeed problems of a different order. All that he says in support of not ruling out transfers is that the "community's concern for impeccable litigative justice" may justify "policy-oriented transfers". (p. 264). This cryptic observation might range over a rather wide field. When we look closely there are other indications. Policy-oriented transfers may be on the ground of "all-India character of the superior courts in the

context of national unity'' or of ''the advantages of inter-State fertilization'' or of ''avoidance of provincial pervicaciousness'' (p. 275). The paragraph in which these words occur begins with the maxim ''Logomachy may confuse''. It surely does in this case! Justice Krishna Iyer does not, surprizingly, think that these considerations are of vital relevance at the stage of initial appointments. If they are going to be still relevant and necessary at the later stage as well, certainly the grounds for such policy-orientation must be cogently and clearly articulated in a decision of this magnitude. This is all the more necessary when the learned Justice reminds us that:

> The nature of judicial process is such that under coercive winds the flame of justice flickers, faints and fades. The still small voice is smoothened by subjective tribulations and anxieties and, if coerced, trembles to objectify law and justice (p. 264).

Whatever the last phrase may mean, if coercive winds may make the flame of justice flicker, faint and fade, what justification is there to interpret Article 222 in such a way that it becomes a wind tunnel adding to the velocity of the vicious winds when there is an equally tenable opposed interpretation available?

Our surprize at Justice Krishna Iyer's uncharacteristic reasoning is even further aggravated when we find him saying that a ''long-held, wholesome convention'' of not transferring judges without their consent, which has endured for a quarter century, ''cannot amend the sure import of the provision by hindsight'' and that the convention represents only a tribute ''to the wisdom of the President and his advisers and the Chief Justice''. He furnishes another supportive ground for describing the argument based on ''convention'' as ''wishful thinking''. He finds, on close analysis, that in all cases where judges had agreed to transfer, ''each such transfer has benefited immediately the judge concerned'' (p. 272). Is it being said, by any chance, that the true test of the existence of the convention would be one where judges consent to transfer even when they are immediately harmed by such transfer? or that

instead of the motivation of immediate benefits, the true test of convention is when they agree to transfer in consideration of a long term benefit? or regardless of benefit or burdens? The observations are too casual to yield any definite meaning.

But the capital point is in the first part of the observation. When conventions to the Constitution grow, they grow out of State practice. If judges have not been transferred for the last twenty-five years without their consent, have not the President and his advisers interpreted the relevant article as providing only consensual transfers or migrations? For, to them also the word ''transfer'' in Article 222 appeared to have two meanings, rather than any ''sure import''. Transfer may mean consensual migration or non-consensual migration. They settled for the first meaning, including successive Chief Justices of India and successive Presidents. They too were interpreting the Constitution and whenever they so interpreted it they were not using any hindsight. In fact, it is arguable that the convention had become a part of the procedure in the effective consultative process under Article 222.

Justice Krishna Iyer has always lamented the lack of growth of healthy conventions in regard to exercise of political power in India. But when politicians, by a rare chance, grow and nurse them for twenty-five long years, through belief and behaviour, should the Courts, by refusing to acknowledge the convention, liberate them from self-imposed constraints on the exercise of political power or reinforce these constraints? How can any convention grow in the aid of the constitutional text if judges become literalists?

Certainly, there is an act of political choice involved here on the part of judges. If they feel that the convention asserted to have grown round a particular law is benign to the purposes of the power and the overall scheme of the Constitution, they should decide to support it. If they find, for the same reasons, that it is malevolent, they might refuse to give effect to that convention. In either case, the value premises must be brought into the disinfectant of daylight, rather than be concealed. For example, Justice Bhagwati and Justice Untwalia concede

in Rajya Sabha would block the Bill was wearing a bit thin. But with all kinds of divisive rumours and actions going on, it may have been felt that that was not the suitable time for proposing such a legislation. But some time had to be bought: at the same time, it had to be assured that it must not be said that the Government acted under any pressure or in a hurry on so vital a matter. Hence the omnibus reference with lightning speed.

Clearly, the reference was a masterly political manoeuvre. The Government did invite some criticism that the action was only a part of delaying tactics on its part; but if the Court accepted the reference, public discussion would be muted owing to the doctrine of *sub judice*. There might have been some anxiety on the possibility that the Court might decline to entertain the reference. Legal advisers to the Government would have pointed out that this was not a significant statistical possibility, as the Court has so far never declined a reference. Moreover, if the Court declined to give an opinion, the Government would at least have proved its *bona fides* by the very act of seeking the Court's advice. The Court, it may have been then calculated, would be in a difficult position if it decided to decline. It would have to give reasons, *without* dealing with any aspect of the matter under reference. Under the circumstances, the Court's reasons, it might have been surmized, would be only formalistic—e. g., the reference was not clear (in which case it could be clarified) or that the Bill was or was not yet before Parliament (which could also be rectified). Then, a second reference would have had to be answered by the Court. If the Court gave no reasons at all for declining the reference, as it was entitled to do, the Court's silence would have been politically explosive, each side interpreting it as a Delphic Oracle. Quite a few people would even have felt that the Court was being arbitrary. At any rate, the problem was skilfully transferred from the Cabinet to the Court. On the whole, it was not a bad political risk for the Government; if it created broad political implications for the Court, *that* was the Court's problem and it could be trusted to handle it judiciously, as best as it could.

Aware as I was of the nature of political calculus, I expressed the view publicly—on the radio and at public meetings—that the Court should decline the reference. Unfortunately, the press felt wary about such comments, presumably on the ground that the matter was *sub judice*. This emboldened me to state publicly that in my considered opinion, this doctrine cannot apply at all to advisory proceedings and it can at best be confined to restricted areas of contentious proceedings. But, at the fag end of the second year of the emergency, the press in the capital was preoccupied with political happenings leaving no scope for social initiative or simple venturesomeness. Anyway, academics are such poor copy for editors!

My view then was, and still is, that the Court should have declined the reference. In a society governed by the rule of law, and one which claimed so recently to having seen the restoration of it, the Union Government simply should not be allowed the plea that it could not determine on its own what was fair and just procedure for expeditious trials. Politicians of all shades insist that Parliament is supreme, that it represents the general will of the people and that it should have the final authority of changing the Constitution. If this claim is genuine, and I believe it is so, how can elected politicians ever publicly say in a democracy that they are unable to decide even the basic elements of a process of fair trial, without prior advice from the Supreme Court? And how can the Court which almost always gives highest deference to the "collective wisdom" of elected politicians in vast matters affecting the rule of law values, legitimate such a claim made by them? On principle, *this* reference was wrong; the Government should not have made it in the first place. For the Supreme Court to entertain it was *doubly* wrong.

I said then (and I say now) that if it was expedient or prudent for politicians to refer the matter to the Court, it was *inexpedient* and *imprudent* for the Court to entertain the reference. The reason for this is that, in strict law, advisory opinions do not bind the Court, even though they may have persuasive value for High Courts under Article 141. In matters

affecting the rights of people in *criminal* proceedings, advisory jurisdiction should not be invoked or granted, because the liberty and life of affected people is at stake. If an advisory opinion is given, it must at least in such matters be regarded, in all fairness, as strictly advisory. Not to do so would be to concede the criticism that as far as the citizen is concerned, the Court gets *co-opted*, at the whim or will of the executive and responsiveness of justices from time to time, as a "third" chamber of the legislature. This, I felt, and still feel, is a very serious change in the system of distribution and management of political power and the mere ground of expeditious trial was not a ground which would justify such a change.

Proceeding on the assumption that advisory opinion was strictly advisory, I then speculated on a situation where the constitutional validity of the Act, passed in scrupulous adherence to it, was challenged before the Court on mixed grounds—that is, some grounds already urged during the advisory proceedings and some new ones. If this were to happen (and just no one, save through sheer dogmatism, can rule out this possibility), the Court would find itself in a most awkward situation. Would the seven justices—who constituted the admission and merit benches—be justified in participating in contentious proceedings? If these benches included the Chief Justice of India and some of the Court's seniormost justices, and if they were to be excluded from contentious proceedings, the Court will find itself in an indefensible position, no matter which way it held. If it departed from the advisory opinion and held differently, the overall authority and image of the Court would gravely suffer since it would either appear that judicial process even at the highest level, is quite fickle or that the Chief and his senior colleagues did not advise the President properly. If, on the other hand, they somehow managed to arrive at conclusions concurring with the advisory opinion, popular impression, nurtured by those affected and also others, may be that 'one cannot really expect justice from the Court in matters involving high political stakes for the ruling party'.

This, then, was the argument based on expediency and

prudence. I felt in August 1978, and persist in that belief, that both principle and prudence required the Court to decline the reference. No pressing problem of the Indian polity was served by entertaining the reference, if we keep in view the non-binding nature of advisory jurisdiction and of the possibility of contentious proceedings challenging the *vires* of the Act. The Court's specific political role lay in dealing with the Act on its own terms. It was *bad* politics to entertain the reference, since no *real* problems of legislative policy-making were here involved. What was involved was merely a new wrangle in an already embattled political party. To be sure, in my approach, the problems of the ruling party may legitimately come, and even crowd, the agenda of the Court in contentious proceedings, as they did for the first year of the post-emergency Court. And the Court, in its wisdom may, if not in *intention* in actual result, assist the party in power. I would go so far as to say that any ruling party may legitimately seek to activate advisory jurisdiction of the Court in matters of political and constitutional action where there is genuine political and legal puzzlement or bewilderment (as was the case in the matter of dissolution of duly elected legislative assemblies in May 1977). But a question of what constitutes fair criminal trial, and how best to combine expedition and justice, or fairness and efficiency, cannot be readily conceded to be one of such puzzlement or bewilderment or even one of paralyzing moral agony as to justify advice from the Supreme Court.

N. THE NON-VIOLENT GHOST: HEGEMONY *ALIAS* HARMONY?

The Court decided to accept the reference. But there were certain preliminary objections of a rather nagging nature which had to be disposed of. One such was the contention that the Court may not function as a legal adviser to the Government or, as put by counsel, as a kind of "joint select committee" of Parliament (p. 398). The reference was quite unique in the sense that for the first time a whole Bill was referred to the Court for advice on its constitutional validity and no specific questions were formulated. It was so general and vague that Chief Justice Chandrachud does observe that at one stage the Court was "seriously" considering the proposal

that it should return the reference "unanswered" (p. 403). But the Court decided to go ahead in view of the formulation of issues emergent in the arguments urged by parties. Justice Untwalia was most explicit in the matter. He said that if the President felt it "constitutionally expedient" (please note the phrase), as was the case here, it "saves a lot of time and money to remove any technical lacuna from the Bill if the Government thinks it can agree to do so" (p. 452). But the President's request did not say in so many words that there were any specific constitutional difficulties potentially attaching to the Bill. The Court then was really being asked to first find the "technical lacunae" and then to help remove them. In a sense then, analytically the Court performs, and was perhaps expected to perform, the combined functions of the law officers of the Union as well as of a Joint Select Committee. Such a task was, quite rightly, not solicited of the Court in any of its previous advisory ventures. The point of objection was not whether it was in the public interest, interest of conservation of time and money, for the Court to respond. The point rather was: *should there be no limits at all to the process of institutional collaboration and accommodation between the Court and Parliament?*

This point was sought to be made, unfortunately, with a rather general reference to Prof. Frankfurter's article on advisory opinions jurisdiction. He had argued that any entrustment or exercise of advisory powers of the Court will "ultimately lead to the weakening of legislative and popular responsibility" and that "references to courts dwarf the political capacity of the people and deaden its sense of moral responsibility". Frankfurter went on to say that "advisory opinions are not merely advisory". Rather, they are "ghosts that slay" (p. 399). Insofar as this line of reasoning was directed against advisory jurisdiction in general, it was bound to fail in view of the existing decisional stances of the Court. But as regards the matter at hand, certainlythese observations had pointed relevance. This was the situation raising questions of immediate political and moral responsibility and accountability, in which an advisory opinion may well turn out to be more than merely

advisory (as ultimately happened). Undeterred, the Court went on to produce a "ghost that slays": it was perhaps thought that one can instead produce a "non-violent" ghost. But this was not, in the nature of things, a possibility.

I press this analogy only because the Court not merely stated that some provisions of the Bill as drafted were not valid; but it went further to say that certain modifications will make the Bill valid. The majority pointed out three infirmities in the Bill. One, that there was no provision in it for transfer of cases; two, that the provision of retired High Court judges presiding over the special courts, at the pleasure of the executive, is "subversive of judicial independence" and three, that the Bill only provided for "consultation" with the Chief Justice whereas it should really provide for "concurrence" (p. 439). The government conceded these three changes. Justice Shinghal felt that even so, Sections 5 and 7 would still be invalid. The net result of these sections, read with Section 4, said Justice Shinghal, is to enable the government "to decide which of its nominated judges shall try which accused or . . . which of the accused will be tried by which of its nominated judges". Such a procedure is incompatible with the *Maneka* read Article 21; it, furthermore, amounts to "serious transgression on the independence of the judiciary" (p. 459).

The importance of this report lies not merely in the distinctive political context and the unusual style in which the Court approached the matter but in the rather more crucial question: Does the Constitution authorize creation of special courts? If it does, what kind of special courts can be created?

The argument on the first point was rather subtle. No doubt entry 11-A of the Concurrent List relating to "administration of Justice, Constitution and Organization of all courts, except the Supreme Court and the High Court", read with Article 246(2), at first sight, empowered Parliament to create Special Courts. But, even when this was to be conceded *arguendo*, there was the further question: can Parliament by law

confer power on the Court to hear appeals on facts and law from the special courts? (Clause 10 sought to do this). Entry 11-A was irrelevant. Of course, Articles 245 and 246 (read with entries 77, 95 and 97 of the Union List) were a possible source of power. But Article 245 begins the conferral of the power by express qualification that it is subject to other provisions of the Constitution. Chapter IV, Part V dealing with the powers and functions of the Supreme Court are such provisions. These provide for the power of Parliament to confer, by law, additional jurisdiction on the Supreme Court (*see* Articles 133 (3), 134(2), 138(1), 138(2) and 139). The situations in which this could be done are, generally, ones which involve *expansion* of the Court's jurisdiction either in relation to High Courts or its own jurisdiction under Article 32 or related jurisdictions contemplated by the provisions of this chapter. The argument, then was, essentially, that Article 245 power must be read with provisions of Chapter IV, Part V. When so read, there was no scope for increasing the power of the Court to hear appeals from special courts, as provided in the Bill. But if these provisions were to be so read, special courts cannot validly be set up, at least within the contemplation of the Bill, since denial of *right* to appeal will be violative of the revived, post-*Maneka* Article 21. Of course, Article 136 jurisdiction would be available; but that provided only *privilege* to move the Court, and not any *right* to do so. *Maneka* would not be satisfied thus.

This was *the* central question. It is a pity that the learned counsel sought to argue it on the basis that provisions of Chapter IV, Part V, formed a 'complete code' with regard to increase in the powers of the Supreme Court. This enabled the Union to contend that the complete code approach may "nullify" the scheme of distribution of powers, or at any rate the legislative competence of Parliament. All this was in a sense not relevant. What was at issue was: do the qualifying words of Article 245 make any sense at all? If they do, inevitably the legislative powers must be so construed as to respect the implicit premise of Chapter IV, Part V, which may be said to be one which only allowed expansion of Court's jurisdiction and powers through

law—only in the realms specified there and not for *any other* (like special courts). But the Court ruled:

> Parliament . . . has the competence to pass laws in respect of matters enumerated in Lists I and III notwithstanding the fact that by such laws, the jurisdiction of the Court is enlarged in a manner not contemplated by or *beyond* what is contemplated by the various articles in Chapter IV, Part V (p. 414 : emphasis added).

Why did the Court arrive at such an unfortunate reading of the wisely-worded Constitution? The answer is that for the first time the Court, which does not itself lag behind in that attribute, ascribes verbosity to the makers of the Constitution! "Some amount of overlapping is inevitable" says the Chief Justice of India "in a Constitution like ours which . . . is drawn elaborately and runs into minute details" (p. 413). In other words, the elaborate provisions of Chapter IV, Part V, intended *ex facie* to authorize Parliament to *enlarge* the jurisdiction of the Court only on specified matters, and not *beyond*, is an example of verbal "overlapping"! This despite the fact that Article 245 qualifies legislative power by explicitly *subjecting* it to other provisions of the Constitution. That too is overlapping! The Court wishes us to read Article 245 as if this qualifying phrase just did not exist!

Predictably, the Court invokes the harmonious construction rule. But that rule or standard of constitutional construction should be recognized as a rule or standard of *hegemonial* rather than *harmonious* construction. For, in the nature of things, two sets of provisions in overt conflict *inter se* cannot be harmonized except by (what Professor A. R. Blackshield termed) "verbal magic". In effect, the Court is here making, remaking or unmaking the Constitution; it is saying that *for the time being* the qualifying words to Article 245 simply do not exist; that the constitutional "source" of legislative power is in Article 245; that whatever else the opening words of Article 245 mean, they do not mean that other parts of the Constitution can possibly either grant or limit Parliament's legislative power.

This is, to my mind, another example of judicial wielding of constituent power.

It is fortunate for future constitutional development that the Court does not here pronounce authoritatively (since this is only an advisory opinion) on this rather important matter of constitutional construction. One hopes that the attention of the Bar and Bench would be, sooner rather than later, drawn to more worthwhile arguments and difficulties with the construction that the Court here prefers and which scholarly writings have emphasized (M. P. Singh, 1977: 73, and materials there cited).

O. THE HIERARCHIC NOTION OF INDEPENDENCE OF JUDICIARY

The second objection to the creation of special courts was not so much legal as a policy objection. The argument essentially was that the creation of special courts on the proposed line was alien to the structuring of the judiciary as contemplated by the Constitution and further that it is "calculated to damage or destroy the constitutional safeguards of judicial independence" (p. 417). This was, in the Chief Justice's words, a "sublime" objection as distinct from those which were "not-so-sublime".

Yet as it happens, four senior Justices, including the Chief Justice of India, give only one paragraph of consideration while negating this sublime contention. Independence of the judiciary is not really threatened, they say, if the correctives they suggest (that transfer of cases should be allowed or that only sitting justices of High Court alone should constitute the Courts) are incorporated in the Bill. If sitting judges of High Courts man the special courts, "there is no reason to apprehend that a mere change of venue" will affect their "sense of independence" or lay them "open to the influence of the executive". But were that to happen, "one may not be unmindful of the benign presence of Article 226" which "may in appropriate cases be invoked to ensure justice" (p. 417). The question was not about sitting or retired justices of High Courts manning special courts but one of whether special courts machinery should be allowed *at all*. And the "benign presence" of Article 226 has been indicated too casually; it does not find a mention in the specific operational aspects of the report on reference to the President. Moreover, what is truly benign about Article 226 is only the fact that the High Courts have powers to intervene; not that they *must*. The benignness is at best discretionary. And when the legislation provides for appeal directly to the Supreme Court from the special courts, it is both conceivable and likely that Article 226 power and discretion may not be exercised by High Courts already groaning under arrears. Arguments would be possible when special courts are set up to the effect that Parliament intended, in the interest of expedition, that the Special Courts Act did not visualize intervention of Article 226 power and that the Supreme Court itself had only made a passing reference to High Court's power under Article 226, which may be considered later to be only a casual obiter.

Of course, the Court rendered invalid the provisions of appointing retired High Court judges to special courts on the clear ground that the "pleasure doctrine is subversive of judicial independence" (p. 435) and insisted on not just consultation but "concurrence" of the Chief Justice of India in the nomination of High Court justices to man the special courts. But that did not amount, after all, to saying that special courts, as Justice Shinghal was to report in his opinion, are not "known" to the criminal law of the land and are not "permissible" by the Constitution (p. 454).

Justice Shinghal also cogently demonstrated that sitting High Court justices are under no constitutional or any other obligation "to serve as presiding judges of special courts" and they cannot be "compelled or ordered against their will to serve there" (p. 457). This indeed is what independence of judiciary is ultimately all about. Whatever be the importance of the matter, neither the President nor the Chief Justice of India can do any more than *request* sitting justices to do things other than what is warranted by the duties explicitly imposed upon them by the Constitution. Justice Shinghal, rightly, went on to say that if sitting justices of High Courts ignore a request from the Chief Justice of India "their very refusal will embarrass

the judicial administration and lower the prestige of the judiciary" besides making the bill "unworkable" (p. 457).

These observations raise a serious doubt concerning the notion of independence of judiciary as understood by the senior justices of the Supreme Court who agree with the Chief Justice of India. Can the Chief Justice of India *assume* that *generally* High Court justices may agree to serve on special courts on his request and advise the President that *some*, at any rate, may do so when the request was made? Can this be done at the *stage* of reporting an advisory opinion without any consultation with the justices of the High Court who were the people most directly affected by the report made by the Chief Justice to the President? No doubt, at the time of actual nomination, particular justices of a High Court may be asked their consent and may accept or decline the nomination.

But a judge who declines a nomination is surely accountable to the Chief Justice of India and, more importantly, to the people of India. What reasons in *principle* could he give? Could he say, if he were convinced, that he should not serve on the ground that the Special Courts Act was violative of the Constitution and of independence of the judiciary? Apart from the embarrassment this would cause all round, there are the observations of the Chief Justice himself which would add to it. For, Chief Justice Chandrachud in terms holds that advisory opinion is "law" declared in accordance with Article 141 and is binding on High Courts. He finds that an opinion like this, based on "almost everything that could be urged" could turn out to be "an exercise in futility" if it were not binding and this would be a "deeply frustrating" result (p. 438).

A High Court judge then may, in good conscience, find it very difficult to say to the Chief Justice that he cannot serve special courts on grounds of principle. He can only urge personal reasons (health, family matters etc.). But as Justice Shinghal suggests were he to refuse on principle, he may still (as a man of the world) apprehend two consequences. As we say this, we say first that the consequences may never ensue,

and are unlikely to ensue given the personal qualities and long tenure that the present Chief Justice of India possesses. Nevertheless, individual justices of High Courts may still apprehend such consequences and they may not be wholly wrong in entertaining them, even in *purely subjective terms*. After all, the nursery of apprehensions is, in most matters, the psyche and their sustenance arises out of the sharing of inter-subjectivities of the group concerned.

The first consequence, rather remote, is that of transfer. The Court has, unfortunately, ruled that transfer under Article 222 does not require the consent of the judge concerned though it requires effective consultation with the Chief Justice of India. The Court has also ruled that "punitive" transfers are not authorized by the Constitution. Certainly, these are important though not *adequate* safeguards. They are not adequate because in the situation now under view, a judge refusing to serve on special court may in his *psyche* feel that a transfer justified on other ostensible grounds as held by the majority in the transfer case (and, therefore, non-punitive) may eventually take place. This apprehension would play a part in the calculus of consent in some cases but a principled judge of the High Court, even when he (rightly or wrongly) apprehends such a consequence, may have to face this prospect with cool equanimity.

The second consequence is more subtle and complex. And this is that a possible elevation to the Supreme Court may be jeopardized by a refusal to serve on the Special Court. Elevation is desired by most High Court justices, though *not* all. Those who desire it, quite naturally, may feel that in following their conscience, they may risk this elevation. This may happen for three reasons. First, they might feel that in protesting against what the Court held, they might displease the Chief Justice of India (which, I believe, would *not* be the case with the present Chief Justice who among all our Chief Justices is quite prepared to re-think rationally his own position, if necessary, in public). Second (an equally baseless fear), judges of the High Court, may still fear loss of elevation because the Government may regard the

refusal to serve the special courts, on grounds of principle, as indicative of too much independence, or of political bias. And that latter is the third aspect. A High Court judge, in the present situation, definitely runs a risk of being branded a pro-emergency judge if he refuses to serve on special courts, *whatever be his principled* objections to such an offer. This "polarization" is a part of post-emergency historical nemesis, which has befallen many men and women in India, in all walks of life. Moral absolutism is an enemy of conscientious moral *and* prudential action; it was so *during* the emergency, it remains so even *after* the emergency.

What appears to be involved in the majority report to the President is not the upholding of the independence of the judiciary but rather of a *heirarchic* view of it. For the first time in Indian history, justices of the highest Court seem to have explicitly presumed that the concurrence of the Chief Justice of India would necessarily mean that of the justices of the High Court. But independence of the judiciary as a value transcends hierarchical considerations. Ultimately, what independence of the judiciary means, or ought to mean, is a collective characteristic, at all levels, of judiciary as a whole and of each and every member of the judiciary as a body.

Of course, the Court having accepted the reference, had to make a report to the President. But it was rather uncharacteristic of the Court to have so little regard for the independence of the judiciary as a whole. This is especially noteworthy when we recall that the Court endorses the suggestion that "investing the High Courts with jurisdiction to try cases under the Bill may, in the circumstances, afford the best solution from every point of view" (p. 438: *per* Chief Justice). The Court also observed that expedition in trials may be attained by the Chief Justice of a High Court not burdening the special judge by any other work for a period of time. But the Court blunts the impact of its own endorsement of this suggestion from the Bar by saying that "the propriety of the action" ought to be a "paramount consideration for those who desire to govern justly and fairly" and that this kind of "propriety" is not for "a Court to decide" (p. 438).

It is surprizing that the Court itself should be so restrained in what are, after all, advisory proceedings on a reference that is admittedly so vague and general. Instead of sanctioning special courts, and making some incidental suggestions as regards structuring of these, could not the Court have made a specific suggestion of investing High Courts with special jurisdiction to try such cases? The device is certainly not unknown: they are the Courts of first instance, for example, in election matters.

Of course, this was not the question before the Court. The only question was whether the provisions of the Bill were valid. The question was not: "How should a law relating to special courts be drafted? but: "Was the law as drafted constitutional?". If the answer was in the negative, the matter must end there. Of course, the Court would have had to give its reasons. But in the present reference it did go *beyond* giving reasons. It made recommendations as to changes in the course of hearings which would make the Bill constitutional *and* recorded a statement of intention on the part of the Government to change the Bill *in the midst of proceedings*. If the Court could go this far, it could have gone a little further, as it did in commending to the attention of the President the "deeply thoughtful" observations of Justice Shinghal. From this, it was only a short hop to make the suggestion, in the operative paragraphs of the report, that if alternative courses of action were available to achieve the same result, a fair and efficient alternative should be preferred or at least quite earnestly considered. After all, whatever is constitutionally "expedient" does not have to be constitutionally wise; nor is that which is constitutionally valid and permissible necessarily just in all cases (e. g. the power to declare emergencies or impose presidential rule in States.) If it was proper for the Court to entertain a reference of this nature, it was, I feel, equally proper for the Court to propose alternatives not just to the clauses of the Bill but also alternative modes of reaching the very same result that the Bill sought to achieve, consistent with the values of prosecutorial efficiency, and independence of the judiciary.

The real problem is that the Court does not want to acknowledge that it is an agency of national government which governs the nation through distinctive ways by the exercise of judicial power. This is clear from this report as well. And yet we find the Chief Justice of India saying that the suggestion to invest High Courts with this jurisdiction of trying emergency offences is a "paramount" consideration for "those who desire to govern fairly and justly". *This* consideration does not extend to the Supreme Court because it does not "govern". But the Court *does* govern, at least in every matter of constitutional adjudication. The executive, the legislature, the people and even the constituent body are governed by the Court. That is the real meaning of Article 141. That article is as important as Article 245 for Parliament and Article 368 for the Constituent Body. Article 141 is a source of judicial power as are Articles 245 and 368 for legislative and constituent power. Despite this, if the Court wishes to say that it is not a part of the body politic, which "governs", one has to respect its privilege of freedom of speech and expression. But to so respect this privilege is not to surrender ours. And I say with utmost humility, but in a spirit of service to resurgent India and a resurgent Court, that the Court can only be effective in its exhortations to the other branches of national government, when judicial power is *self-consciously* used to serve what seems to it, from time to time, to be the constitutional mandate. It is bad politics to convert one's power into pious exhortations when one is convinced, as here, for manifestly good reasons, that the high objectives of constitutional morality could be served better by effectively articulating alternate strategy of political action. If exhortations fall on deaf political ears, it may be due to the fact that politicians find exhortations inaudible because their ears are usually attuned to the high-pitched sound of what the Court actually conveys in its operational holdings.

P. THE "SUCCESSOR TRIAL": POLITICS OF SPECIAL COURTS

Justice Shinghal prefers a more direct path. He takes explicit political factors into account. He describes special courts as a species of "successor trials". In such trials people

who have captured political power seek to

> hit an adversary a second time after his initial discomfiture and displacement from power or authority and in the case of an accused who has held a high political status, it may have the effect of destroying his political future (p. 460).

From this premise, Justice Shinghal does not argue, as post-emergency moral absolutism may suggest, that such people should *not* be tried. Rather, he says that the values of due process and fair play should be highly visible to all people in such trials, lest there might be erosion in the legitimacy of the law and the Courts administering it. The accused, he says, must be convinced that his successors

> had the best of intentions in ordering the trial and had provided a fair and straightforward procedure, *and the cleanest of judges*, for the trial in an *open and fearless manner* (p. 460 : emphasis added).

The measures must, of course, convince not just the accused but everyone that the trial is not "spectacular in purpose" and that it does not "expose those facing it to a risk greater than that taken by any other accused at an ordinary trial under ordinary law". Justice Shinghal invokes the reference to human dignity in the Preamble to our Constitution as a "treasure" and a "priceless possession" and the "solid hope" of all citizens at the "majesty of the Rule of Law" to sustain his invalidation of the additional clauses of the Bill. In this invalidation, he goes beyond the majority and even rejects the idea that special courts can be set up under Section 6 of the Criminal Procedure Code (pp. 456-57). The majority report commends, as noted, these observations as "deeply thoughtful". (One may say in passing that the reference to human dignity furnishes an adequate ground in situations like *Shiv Kant* and *Bhanudas*, though one hopes such situations never recur.)

Justice Krishna Iyer is equally explicit about the politics of the emergency and post-emergency periods. He speaks of the "hushed spell of the emergency era" as being "haunted by a hundred vampirish villanies which held vital freedoms in thraldom". But he is equally clear that the top "political power wielders had in the past often escaped" prosecutorial action

even after "judicial commissions had found a *prima facie* case against them". The "pathology of their escape from the coils of judicial process", he says, cannot be "misdiagnosed as due only to the emergency virus" (p. 446). He cites several reports of judicial commissions of enquiry to illustrate and reinforce his conclusion that somehow "a few manage to be above the law and the many remain below the law". He adds pointedly: "How ? I hesitate to state this", after having more or less stated it.

Justice Krishna Iyer is, therefore, of the view that emergency does "not segregate corrupt ministers and elected caesars into two separate categories" and goes on to suggest that they are "a common enemy, with continuity in space and time and, for social justice to show up, must be tracked down by a permanent statute" (p. 446). He says that the "benign purpose" of the Bill which selects "criminals" by reference only to the emergency becomes "a crypto cover-up of like criminals before and after" and that such an "ephemeral" measure to "meet a perennial menace is neither a logical step nor national fulfilment". Although, therefore, the classification is thus "on the brink of constitutional breakdown", he finds it justified through "pragmatic principles rooted in precedents". The application of these principles helps him discover that the classification in the Bill is justified because it picks out "a hectic phase, a hyper-pathological period" of "constitutional tyranny" where arbitrary detention and torture rather than recourse to justice by the court prevailed (p. 448).

And yet even this "salvationary" and "pragmatic" alternative does not lead Justice Krishna Iyer to depart from the view of four justices that the emergency offences jurisdiction could not validly extend to a period beginning February 27, 1975 as proposed in the Bill. The mover of the Bill and the Solicitor-General of India had argued that that date was the most pertinent, as it marked a "clear trend to protect excesses and illegalities" (p. 431). The argument relied on a discussion in the Lok Sabha pertaining to the Maruti affair, when the Prime Minister in effect absolved her son from any irregularity in the conduct

of his business. It is not clear from the gist of the argument as reported that this was all that was said at the hearings. It is not clear why at least Justice Krishna Iyer did not sustain the contention since his major premise was precisely that as far as excesses and illegalities were concerned these were not a truly unique emergency phenomena. There was, as he said, a "continuity in space and time". Surely, then, whatever limited continuity that the Bill preferred to proceed with should have been respected *faute de mieux* by Justice Krishna Iyer.

Much of the political history of India in 1973-75 was connected with the Maruti car project. The opposition saw in it a source and symbol of much corruption in the establishment and Mrs Gandhi saw in it a personal attack against her son and herself. In a sense, the immediate pre-election politics was all about the people's car; the immediate post-election politics was also in some ways about the maker of Maruti. What the Hon'ble Member had clearly in view in his private Bill was not just to include Mrs. Gandhi and her associates in the class of those who appeared before the special courts but also Mr. Sanjay Gandhi and his associates. The Court would surely have been aware that the Maruti affair was being investigated by a commission (Justice A. C. Gupta) and that the Jaganmohan Reddy Commission was similarly examining the charges against Mr. Bansi Lal, the ex-Chief Minister of Haryana and the ex-Union Minister of Defence in the Indira Government. In other words, it was clearly intended that all cases relating to Mr. Gandhi and his associates must be initiated in or transferred to the special courts. The Preamble to the Bill, of course, did not make a specific reference to any case; it referred generally to the class of cases where "offenders were being screened by those whose duty it was to bring them to book".

Indeed, the sixth preambulatory paragraph stated that it was "imperative for the functioning of parliamentary democracy and institutions created by or under the Constitution of India" that the offences recited in the Preamble should be judicially determined with the "utmost despatch". The Chief Justice of India relied on this recital as a basis for holding that there was true "nexus between the basis of classification under

Clause 4 (1) and the object of the Bill". Indeed, he developed this idea a little further:

> Longer these trials will tarry, assuming the charges to be justified, greater will be the *impediments in fostering democracy*, which is not a plant of easy growth. If prosecutions which the Bill envisages are allowed to have their normal, leisurely span of anything between 5 to 10 years, *no fruitful purpose* will be served by launching them. Speedy termination of prosecutions. . .is the heart and soul of the Bill (p. 429: emphasis added).

If leisurely trials would constitute "impediments to democracy" why relegate to ordinary legal processes trials of those matters which could be said to have arisen between February 27 and June 25, 1977? And if the overriding concern for the majority arises out of *preservation of democracy* (an aspect of basic structure) why does the majority report fail even to endorse the plea for a "permanent statute" dealing with "corrupt ministers" and "elected caesars"?

A political scientist might also find the reference to a period of five or ten years significant, as each unit of time is a measure for the scheduling of general elections. The statement that no "fruitful purpose" will be served if the trials "tarry" longer assumes quite a bit of political significance, though not judicially intended. The word "*fruitful*" has to be understood in the context as fruitful in terms of "fostering democracy". It is clear that the Court wishes to say:

> Please go ahead. If the prosecutions are genuine, as we feel they are, let these be processed quickly. If they are proved to be false, let this also happen expeditiously. The elections are about three years hence. Let us clean up the political mess. For if we do not, we know that healthy growth of democracy, and patterns of party political development and national leadership may suffer.

But why swallow the camel and strain at a gnat? What is wrong in having alleged offences between the period February 27 to June 25, 1975 being tried by special courts as well? The

Chief Justice holds that to do so would be to, as it were, 'antedate' the emergency. And this cannot be reasonable under Article 14. But the Bill has not been, in terms, concerned with emergency offences as such; it is expressly concerned with all those offences which were committed or *continued* from February 27, 1975 to such period as was affected by the proclamation of the emergency. The classification in the Bill was not wholly emergency-oriented; but the majority report to the President says that it should be wholly so in order to be valid. Why? The Chief Justice advises the President that inclusion from the period February 27 is "wholly unscientific and proceeds from irrational considerations arising out of a supposed discovery in the screening of offenders"; the categorization of these as emergency offenders is "too artificial to be sustained" (p. 432).

Of course, once you decide that the Bill is, or *ought* to be, about emergency offences no other class of alleged offenders of the pre-emergency period can be validly brought in it. It is clear that learned counsel, including the mover of the Bill, failed to persuade the Court that the Bill was not wholly about emergency offences. Suppose the Government appoints more commissions of enquiry and has cause to believe that *prima facie* cases exist against politicians in power and others from the date of the Fifth General Elections results till June 25, 1975 and decides to have them tried by special courts. Would such a classification be valid? Would it be valid to refer these matters to the same special courts as would deal with the "emergency offenders"? There is no way to tell for sure.

The point transcends mere doctrines or techniques of classification, which in any event depend for their longevity and growth on the justices of the Supreme Court who from time to time nurse and nurture them. But it is clear that in this reference the Court was confronted with more than the question of reasonableness of classifications.

There was the problem of "successor trials" as Justice Shinghal put it. There was the reluctance of Justice Krishna Iyer in regarding the classification as reasonable, and the problem, as he put it, of "*crypto cover-up of like criminals before and*

after" the emergency (p. 440 : emphasis added). This was a sort of view which could be carefully exploited in *contentious* proceedings by affected parties later. Then there was the robust, no-nonsense, get-tough attitude expressed in Justice Untwalia's short opinion which, in effect, says : 'Let them get going : it is time something was done' (pp. 451-52). The report had to be an amalgam of the different and sharply divergent attitudes on the Court having their votaries on all sides in the Bar, the political parties, media, intelligentsia and people at large.

To these latter groups the main problem was of political justice. But for the Court there was also the major issue of preservation of the values of the independence of the judiciary. One had to be achieved at not too great a cost to the other.

It would be true to say that such a situation had never arisen so acutely in the history of the Court before. The Court's own performance in *Maneka* now made it inevitable to hold that not all of the procedures prescribed by the Bill measured up to the demands of due process in Article 21, even if most of challenges to Article 14 were well met. But if *Maneka* reigned, the very creation of special courts became problematic. It is interesting and significant that all the justices, except Justice Shinghal, preferred to view the argument that special courts violate the values of the independence of the judiciary not in terms of restrictions imposed by Chapter IV, Part V of the Constitution but through post-*Maneka* Article 21.

It was a mistake to have entertained such a vague and general reference. Having taken that initial decision, the Court had no other alternative but to face the difficulties which ensued. A measure of these difficulties is to be found in the reasoning underlying the opinions analyzed by us. It is also to be found in the fact that four separate reports were tendered to the President.

As indicated in the previous section, the difficulties may not be over. Affected people may challenge the binding nature of the advisory opinion before the very special court trying them in preliminary contentions. And the matter may

eventually fall to be decided by a different Bench of the Court, with all the resultant embarrassment identified earlier in our analysis. The nomination of special court justices may be challenged on various grounds to be employed as delaying tactics or on genuine grounds of justice as seen by the affected people. At any rate, bias may be imputed to the special court judge, and regardless of actual foundation of this, adverse publicity may be the gain that politically minded accused may derive, apart of course from adding to the dilatoriness of the proceedings. Indeed, the very day Rajya Sabha modified the Bill, Indian newspapers carried the report of 'sensational' allegations by Mrs. Bandarnaike against the Chairman of the Presidential Commission enquiring against her.

The proposed modifications by the Rajya Sabha are also likely to be approved by the Lok Sabha in its current session. The Congress (I) declared the law as "black law". And while the CPI joined the Janata voting ranks, only thirty out of forty-six Congress party members did so. But for our purposes what is important is the fact that the Bill was passed with two amendments. First, the Bill is to be extended to all offences, whether committed before, after or during the emergency. And second, the Bill now removes the power of the President to nominate judges for the special courts with the concurrence of the Chief Justice of India and vests it in the Chief Justices of the High Courts in consultation with the Chief Justice of India. (*Times of India*, March 22, 1979, col. 2). Both these amendments, if carried out, introduce major modifications in the Bill as approved by the Supreme Court. They open up a way for the formidable argument that the pronouncement in the reference, even if binding for the purposes of argument, cannot anymore be so regarded.

The first change, one would like to think, represents the direct impact of Justice Krishna Iyer's luminous observations. On the other hand, the change seems to neatly get around the Court's objection to having trial matters from February 27, 1975 to June 25, 1975 being tried by the special courts. The result would be to enable trial in regard to Maruti and other matters also before the special courts. This change

overruns the Court's objections to the inclusion of this period as "artificial" or "unscientific" or "wholly irrational". By the same token, the classification is now (if adopted) so basically different that it would necessitate a substantial renovation of the preambulatory recitals in the Bill. Obviously, these will be modified; but if for any reason they are not, or they are inadequately modified, arguable issues may arise when actual trials commence. In any event, one may expect the issues to be brought before the Court again.

Regardless of the challenge to the Act on these lines, if no prosecutions are initiated with regard to pre-emergency (that is the 1971-75 period) and the post-emergency periods before the special courts, affected political groups would find suitable legal devices to come to the Court alleging discrimination. How the Court would deal with these matters is rather difficult to foresee. But it is easy to foresee that the Supreme Court will be expected by the people of the country to crack down on the "crypto cover-up". Or else their faith in the Court, so extravagantly nourished by it, as the inevitable agency to cleanse and heal the body politic will be seriously eroded.

The second change modifies the opinion of the Court only in relation to the concurrence of the Chief Justice of India in the appointment of judges for the special courts. The Chief is now only to be *consulted* by the relevant Chief Justice of a High Court. Although now the executive role in such appointment is altogether removed, and wisely so (representing to some extent a tribute to Justice Shinghal's views on the part of the elders), what has happened, in strict analysis, is that the authority of the Chief Justice of India now stands *diluted* from concurrence to mere consultation. Given what I have called the *hierarchic* view of the independence of the judiciary, this amendment creates another source of embarrassment for the Court and the Chief Justice of India.

By the same token, it is not going to be easy for anyone to challenge this amendment. Yet if anyone was to do so, quite apart from its use as dilatory tactics, he has an excellent ground so to do in view of the fact that the Court has expressly

ruled that this advisory opinion is to be binding on the High Courts. But the Court is unlikely to strike down this kind of change, as it cannot be said in *public* that the change violates the independence of the judiciary. The affected High Court justices might now be relieved of their embarrassment or apprehensions depicted by us in the last section in declining the appointment on grounds of *principle*. But not quite so, as in any event, most Chief Justices of High Courts may equate consultation with the Chief Justice of India to mean his concurrence, though on strict analysis it need not be so.

Apart from all this, if the elders' amendments are approved by the Lok Sabha, massive problems for the appellate judiciary in India are bound to arise in terms of *workload*. This would happen if prosecutorial discretion is vigorously used in an all-round, impartial manner. The Supreme Court's appellate jurisdiction over special courts would rapidly increase, as appeals will lie on fact and law and even on interlocutory orders. Additional justices may have to be appointed to High Courts to susbstitute for High Court justices transferred to the special courts for the functioning of such Courts. Perhaps, the Supreme Court itself may need additional manpower. While all these are high costs that other classes of litigants will have to pay for a belated national concern for the abuse of political power, the appellate judiciary would find itself in severe accentuation of the crises which already holds it in its thraldom. By the same token, the Supreme Court will even more overtly become a centre of political power and even of oppositional politics. In the years to come, the Court will not merely be an arbiter of the destiny of the Constitution but *also* of the patterns of political leadership, political morality and justice in India. The Court's own performance in these matters may well shape the political future of India.

Q. THE POST-EMERGENCY SUPREME COURT AND PRISON JUSTICE

The post-emergency Court has taken rapid strides in claiming prison justice as its own province. The transformation owes tremendously to the crusading spirit of Mr. Justice Krishna Iyer. What is striking about the post-emergency Court is that

it has begun to make (mostly again through the valiant efforts of Justice Krishna Iyer) not just rhetorical, but instrumental, assault on prison conditions at the stage of reviewing of sentences. While confirming or reducing sentences, the Court has taken upon itself the unenviable task of protecting the residuary rights of prisoners. Through this process, it has encouraged prisoners — undertrials as well as convicts — to appeal confidently to the Court for violations of legality by jail authorities. One hopes that in this process of correctional treatment for our "correctional" institutions, the Court will *somehow* find the occasion and courage, to bury without honours the holding in *Bhanudas* in a manner that *no* future resurrection of its "reasoning" or "authority" is ever possible before *any* Court in India. Let us now examine the evolution of constitutional *Karuna* (in the evocative phrase of Justice Krishna Iyer) for prisoners with reference to a few decisions of the Court.

In *Md. Giasuddin* v. *State of A. P.*, the Court (Krishna Iyer and Jaswant Singh, JJ.) not merely reduced the sentence of the twenty-eight year old appellant but issued several directions to the State to convert the eighteen-month sentence into "a spell of healing spent in an intensive care ward of the penitentiary" [(1977)3 SCC 287, 295]. The Court directed, and the State accepted, that the convict be "assigned work not of a monotonous, mechanical, degrading type but of a mental, intellectual or like type with a little manual labour". The Court also directed the jail visitors to "instil in him a sense of ethics which would make him a better man", and desired that the jail authorities afford him such educational and recreational facilities "as would stimulate his creativity and sensitivity". While the Court did not *prescribe* it, it urged jail authorities to consider the desirability of providing instruction in Transcendental Meditation to prisoners. Subject to jail rules, the Court also directed the State to grant the convict parole release for at least a week "every three months" and further directed the Advisory Board of Prisons to "periodically...check whether the appellant is making progress and the jail authorities are helping in the process and implementing the prescriptions hereinbefore given". Expressing shock

and indignation that rules for payment of wages to prisoners were still being processed by the State of Andhra Pradesh, it urged the State to finalize the rules, to ensure that the rates are not "trivial" but "reasonable", and that the State gives retrospective effect to the wages with effect from October 2, 1976 (the birthday of Mahatma Gandhi) (p. 298).

Justice Krishna Iyer (with Goswami, J.) further developed the theme of humane jail conditions in the case of a twelve year old boy convicted of homicide in *Hiralal* v. *State of Bihar* [(1977)4 SCC 44]. Here again the Court directed that "reformatory type of work should be prescribed for the appellant in consultation with the Medical Officer in the jail". It directed the "visitorial team of Central Prison" to ensure that this was implemented. Periodic parole was also prescribed. The Court was even more elaborate in stressing the regenerative and reformative potential of Transcendental Meditation and urged the prison authorities to arrange, with the consent of the prisoner and under medical supervision, initiation into "courses which will refine his behaviour and develop his potential" (pp. 52-53).

Doubts concerning judicial power assailed the Court. It found, after commissioning a study from counsel, that while it had powers of sentencing, marked by "uncanalized fluidity", its "correctional role" was "marginal". It was thus constrained to convert its "binding mandates" into "hopeful half-imperatives". In doing so, it deplored the fact that the "Raj prisons continue gerontologically in their grimy grimness" and the fact that most "Indian Ministers, *now and before*, who were no strangers to prison torments" had done so *little* to reform the conditions in prisons. Justice Goswami, too, was moved by Justice Krishna Iyer's "attractive and trenchant manner" in dealing with "both the *lethargy in law-making* and indifference and *indolence in implementing laws*" to plead that Justice Krishna Iyer's "earnest and anxious observations will not be a cry in wilderness" (pp. 55-56 : emphasis added).

M. H. Hoskot v. *State of Maharashtra*[(1978) 3 SCC 544] nurtured further the mood of the Court. Hoskot, a reader in Saurashtra University, was convicted for three years; his

special leave petition matured before the Court in 1978, *after* the sentence was served, and disclosed that Hoskot was unable to obtain a certified copy of the judgment of the High Court until 1978. A free copy of the judgment was sent to Yervada Prison, Pune; the Prison Superintendent could not satisfactorily show that the copy was actually supplied to the prisoner. The Court held that although the prisoners are "situationally at the mercy of the prison 'brass' ", jail authorities cannot deprive prisoners of their fundamental right of appeal by their *ipse dixit*, without "a title of prisoner's acknowledgement" that the copy of the judgment was ever given to him. The Court, in terms, held that: "Any jailor, who, by indifference or vendetta, withholds the copy (of the judgment), thwarts the court process and violates Article 21, . . . may pave the way for holding the further imprisonment illegal" (p. 553). The Court pursued further its "activist" interpretation of Article 21 [as developed in *Maneka Gandhi*, (1978) 1 SCC 248] to hold that Article 21 did not merely protect the statutory or constitutional right to appeal to higher courts but also the "necessary concomitant of right to counsel to prepare and argue his appeal" (p. 556). The newly introduced Directive Principle 39-A obligating the State to provide legal services impelled the Court to further specify the ways in which prisoners' rights in this regard were to be protected. It ordained that the sentencee should receive on acknowledgement a certified copy of the judgment; that "every facility" for the exercise of the right to appeal shall be provided by jail authorities. It also required courts, in case of prisoners' appeals, to assign "competent counsel" at State expense where "the prisoner is disabled from engaging a lawyer, on reasonable grounds, such as indigence or *incommunicado* situation". Further, it held that "these benign prescriptions operate by force of Article 21 . . . from the lowest to the highest Court where deprivation of life and personal liberty is in substantial peril" (p. 557).

The Supreme Court's march towards civilizing our prisons continues with unabated vigour. In dealing with conviction under Section 302 of the Penal Code (read with Sections 34 and 307) of two young men (of sixteen and twenty years of

age), Justice Krishna Iyer (with Jaswant Singh, J.) sought practical ways to mitigate the "psychic distress" during their life-sentence incarceration. Invoking the rehabilitative culture of India (from Saint Valmiki to Mahatma Gandhi), Justice Krishna Iyer concretized certain directions to the State to ensure that the jail authorities give to these prisoners "treatment which is not likely to degrade or offend dignity and decency but uplift and elevate". The work to be assigned to them must be "satisfying and not degrading". The Medical Officer was assigned specific responsibilities in this regard. Parole for two months after every period of one year, interviews by family members "as often as are sought", encouragement of "useful crafts" were among other specific directives. The Sessions Judge was directed to "make jail visits to ensure compliance with these directions". The Court again reminded the State that "Article 21 . . . is the jurisdictional root of this legal liberalism" and the State ought to take steps "to comply with this curial command" [*Inder Singh* v. *State* (*Delhi Administration*), (1978) 4 SCC 161, 165].

In *Lingala Vijay Kumar* v. *Public Prosecutor* [(1978) 4 SCC 196] seven young appellants "dangerously ideological teenagers" invoked the Court's "constitutional *Karuna*" once again to make their two-and-a-half years' rigorous imprisonment a little more bearable. The Court specifically directed that these young men "shall not be treated with any tinge of brutality—a caveat which has become necessary when we remember that they are treated as 'naxalites' " and witnesses testifying against them have been "hurriedly rewarded by the Chief Minister"—a practice which the Court unequivocally denounced (p. 203). Justice Krishna Iyer went further to urge that prisoners are not "non-persons" and that the Court shall not permit "inhumanity". He ruled that the Court maintains its continuing jurisdiction: "On an appropriate motion . . . showing violation of residual rights of the prisoners by unnecessary cruelty and unreasonable impositions and denials and deprivations within the prison-setting" the judicial process will make jailors "respect the fundamental rights of the appellants".

Particularly striking in this case was the Court's more specific concern with homosexuality in Indian prisons. The Court cautioned against these adolescents being made "homosexual offerings with nocturnal dog-fights". It directed the Jail Superintendent to separate the "young incarcerates . . . dusk to dawn from sadistic adults" (p. 203).

Sunil Batra v. *Delhi Administration* [(1978) 4 SCC 494] is the most significant decision on prison justice since the inception of the Supreme Court of India and the independence of India. *Batra* exposes, in lurid detail, the nature of unauthorized practices which prevail in Indian jails; the advantage of a judicial exposé are many. It may educate a very large number of members of the Bar, and academics, whose world of the law is only confined to the pages of the law reports. A decision of the Court, when it contains such exposé, is bound to have greater impact on the administration and the *politics* of jail reform, as compared to the reports of commissions of enquiry, which may be non-priced (or excessively priced), and therefore may remain available only to a handful. There is also the fact that *Batra* constitutes law binding on all courts throughout India; imaginatively used, many aspects of *Batra* have potential for initiating through judicial action widespread changes in prison administration and conditions of detention. *Batra* is as fundamental a decision for administration of criminal justice as *Kesavananda* is for constitutional development.

Batra also marks a maturity of judicial concern for conditions of detention. For the first time in its history, the Chief Justice of India (Beg, C. J.) visited with his brethren (Justices Krishna Iyer and Kailasam) the Tihar Jail (on January 23, 1978) to ascertain the actual conditions; and the memorandum prepared by the Chief Justice was used as a basis for reasoning by the Court. If not for the first time, *Batra* also furnished the relatively new "processual feature" in that the Court permitted the "Citizens for Democracy", a voluntary group concerned with human rights, to formally intervene in the case.

Batra involves two cases; but one single issue. That issue is one of the protection of residuary fundamental rights of

prisoners. The Court holds that prisoners are entitled to all fundamental rights consistent with their incarceration and the legal regime of prison is as much subject to constraints of legality and constitutionality. The Court is able to do so, with cogency, because of the basic reinterpretation of Article 21 in *Maneka Gandhi* [(1978) 1 SCC 248], which unambiguously laid *Gopalan* to rest. It interpreted Article 21 to mean that the procedure for deprivation of life and personal liberty established by law can no longer be *any* procedure. The law itself, ordaining the procedure, must "stand the test of one or more of the fundamental rights conferred under Article 19 . . . *ex hypothesi* it must also be liable to be tested with reference to Article 14" (p. 283 : *per* Bhagwati, J.). The law thus must be "right, just and fair and not arbitrary, fanciful or oppressive" ; otherwise it would be "no procedure at all" (*Batra*: p. 575). The fact that prisoners should be the beneficiaries of the new constitutional regime must be regarded, in view of the *habeas corpus* and *Bhanudas* cases, as perhaps more than a historic coincidence.

Sunil Batra was awarded the sentence of death : he was awaiting confirmation of the sentence and subsequent pathways of appeal to the Supreme Court. He was confined in a solitary cell during the pendency on the ground that Section 30(2) of the Prisons Act mandated it. That section required that a prisoner under the sentence of death shall be confined in a cell apart from all other prisoners and shall "be placed by day and by night under the charge of a guard". Not merely was the solitary confinement of Batra impugned as being outside the authority of Section 30(2) but the validity of that provision itself was challenged as violative of Article 21, under the *Maneka* dispensation from the regime of *Gopalan*.

The Court, unanimously, condemned the solitary confinement of Batra. Such confinement was a specific punishment within the powers of the Court to award or within the disciplinary powers of prison administration. In either case it is limited in duration by law—a maximum of three months under the Penal Code and of fourteen days, at a time, in cases where it is imposed by jail authorities for violation of prison discipline.

The Court considered solitary confinement as an extreme punishment: it deplored it as "gruesome", "revolting", anachronistic and having "degrading and dehumanizing effect" (pp. 569-70: *per* Desai, J., for himself and Chief Justice Chandrachud, Justices Murtaza Fazal Ali and P. N. Shinghal). Justice Krishna Iyer was more vivid in his denunciation: such confinement is a "near-strangulation of the slender liberty of locomotion inside a prison" (p. 523); it is "counter-productive" (p. 523), an aspect of "blood-thirsty prison behaviour" (p. 524) and "a revolt against society's humane essence" (p. 532).

And yet the Court did *not* find Section 30(2) of the Prisons Act constitutionally invalid. Rather, it sustained its validity. The provision was read down to apply *only* to prisoners under the sentence of death: prisoners would have this status only when all their appeals against sentence had failed, including the clemency petition. Therefore, until such time, no prisoner awarded capital punishment can be placed in solitary confinement (pp. 537-540, 571-574). Such prisoners shall not be denied human fellowship or normal amenities. Not being prisoners sentenced to hard labour, they may be given only minor work. Even when the death sentence has become final, the Court held that all that is required by Section 30(2) is *separate,* not *solitary,* confinement. Even such prisoners are not to be "completely segregated except in extreme cases of necessity" (p. 575); they may be "kept *apart from other prisoners*" (p. 566) but not given solitary confinement in the sense of cellular confinement depriving them of *all* human communication and fellowship [this being the 'hard core' of 'solitary confinement' (p. 537)].

Justice Krishna Iyer's detailed rebuttal (or demolition) of the affidavit of the Jail Superintendent makes agonizing reading (pp. 517-524). It was contended that solitary confinement was essential to protect death sentencees from themselves, against suicide or "any other criminal activity in their voluntary discretion" or against "escape". It was averred that prisoners under death sentence have a "very harmful influence on other prisoners". If such prisoners are "mixed up with other categories of prisoners", it was argued, "then the very

basic structure of superintendence and management of jails will be greatly jeopardized". The Superintendent justified his 'treatment' of such prisoners in view of "the relevant sociological aspects of security relating to Society in modern States". Justice Krishna Iyer was clearly anguished by these obviously 'facile' contentions, which he met only by way of prison pedagogy. But he could not help saying that a "franker attitude" of the Prison Superintendent might have been to state on oath that

> prison praxis handed down from the British Rule has been this and no fresh orientation to the prison staff or rewriting of the jail manual having taken place, the Past has persisted into the Present and he is an innocent agent of this *inherited incarceration ethos* (pp. 522-23: emphasis added).

It is important to emphasize that this "inherited incarceration ethos" is not limited to harassed and neglected jail officials. Unfortunately, it permeates even higher judiciary and, as *Bhanudas* shows, even at the Supreme Court level. The learned single Judge of the Delhi High Court in this very case testified to this ethos when it gave Batra's petition a short shrift by saying that "there is no force in the petition", having stated that "I am of the *clear* view that he cannot be given the facilities as it might lead to *disastrous consequences*" (quoted at p. 515: emphasis added). The significance of *Batra* lies in the initiation of liberation of the higher judiciary of the "inherited incarceration ethos". One hopes that, before long, it would also initiate the liberation of the *captive* custodians of prisons as well. The test of such an initiation would be the acceptance by jail authorities of Justice Krishna Iyer's ruling that the recipient of capital punishment is—till the point that his sentence becomes final—a "*guest* in custody, in the safe keeping of the host-jailor.... This is *trusteeship* in the hands of the Superintendent, *not* imprisonment in the true sense" (p. 535: emphasis added).

The plight of *Charles Sobraj* (also canvassed in *Batra*) strikingly manifests the deplorable colonial ethos, prevalent both among judges and jailors. Sobraj, alleged to be a notorious

criminal, with a record of previous escapes, was put in bar fetters, continuously, for twenty-four hours a day, from July 6, 1976 till the Supreme Court made an interim order in his favour on February 24, 1978. Sobraj unsuccessfully moved the High Court which in a non-speaking order dismissed his petition *in limine*. Justice Krishna Iyer (and Justices Beg and Kailasam) saw Sobraj and other prisoners in Tihar Jail

> standing in chains in the yard, with irons on the wrists, iron on ankles, iron on waist and iron to link up, firmly rivetted at appropriate places, *all according to rules*! (p. 545 : emphasis added).

A large number of other prisoners were also kept in 'irons' (p. 546) in Tihar Jail. Justice Krishna Iyer had no difficulty in working out the arithmetic and sociology of 'iron methodology' of prisons: Sobraj was the only class B prisoner in irons, all others were class C—who were, by definition, poor. "Practically all these fettered creatures are the poor" ; poor can be regarded as "dangerous" only by a "subversion of our egalitarian ethos". Justice Krishna Iyer unsparingly denounced "the class character of jail injustice" (p. 548).

Once again the State sought power from Section 56 of the Prisons Act. That section allows the Superintendent whenever he considers it necessary, with reference either to the state of the prison or the character of the prisoners, for the safe custody of prisoners, that they should be confined in irons subject to rules and regulations. The Court upheld the *vires* of Section 56 but it imposed rigorous requirements upon the Superintendent. It held first there must be nexus between imposition of irons and the considerations of "the security of the prison and safety of the prisoner". Second, the determination has to be that there is a *necessity*, which is opposed to mere *expediency*. Third, the determination has to be made after a full application of mind to all relevant circumstances; this latter excludes the "nature and the length of sentence or the magnitude of the crime committed by the prisoner". Only the "special and peculiar characteristics of each individual prisoner" have to be anxiously and fully considered (p. 578; *see also* p. 558). Although the Court resisted the contention that Section 56 was

bad because of excessive delegation by uncanalized and unguided discretion being conferred upon the Superintendent, it had no hesitation in holding that imposition of bar fetters, in violation of the foregoing requirements, and for "an unusually long period" would be "arbitrary" and violative of Article 14 of the Constitution (p. 579).

Justice Krishna Iyer, with whom the other justices specifically agree in their concurring opinion (p. 580), clearly held that irons could be applied only in the following conditions:

(*i*) where an undertrial has "a credible tendency for violence and escape" and other "disciplinary alternatives are unworkable" ;

(*ii*) the burden of "proof of the ground is on the custodian" : if he fails "he will be liable in law" ;

(*iii*) the "iron regimen" which should be "humanely graduated" shall in "no case go beyond the intervals, conditions and maxima" and always be "for short spells, light" and "never applied if sores exist" ;

(*iv*) previous hearing, with information of the grounds shall be afforded to the "victims" ;

(*v*) communication of grounds shall be in a language understandable by prisoners ;

(*vi*) if there is no provision for "independent review of preventive and punitive action, for discipline or security" such action shall be "invalid as arbitrary and unfair and unreasonable" exposing prison officials to civil and criminal liability ;

(*vii*) prolonged imposition of irons in any context—preventive or punitive—shall be subject to "previous approval" by Chief Judicial Magistrate or Sessions Judge, who shall hear the "victim" ;

(*viii*) fetters, especially bar fetters, "shall be shunned as violative of human dignity inside and outside prisons" ;

(*ix*) the "indiscriminate resort to handcuffs" when accused are taken to and from Court is illegal and shall

be stopped" save in small number of cases as in clause (*i*) above;

(*x*) legal aid "shall be given to prisoners to seek justice from prison authorities, and if need be, to challenge the decision in Court", in cases "where they are too poor to secure on their own" (pp. 563-564).

In many respects, the foregoing represents more specific, and more worthwhile, guidelines than those embodied in the Model Jail Manual (1970).

Batra illustrates well the obsolescence and pathos of jail manuals. Tihar Jail is still governed by the Punjab Jail Manual, virtually unrevised since the days of the British Raj. The Court lamented the fact that the manuals are largely a "hangover of the past" still retaining "anachronistic provisions like whipping and the ban on the use of the Gandhi cap" (pp. 512, 580). The attention of the Court was not drawn to the Model Prison Manual (1970); otherwise, it could have authoritatively urged the Union Government to apply it *at least* to Tihar Jail!

Justice Krishna Iyer added two twists of the knife to this uncivilized state of affairs. One related to the peculiar state of affairs where even the Solicitor-General of India could not demonstrate the source of authority for certain rules in the Punjab Manual, purported to be made under Section 56 of the Prisons Act (it lay buried in the archives of undivided Punjab, perhaps in Pakistan). He was constrained to hold, therefore, that the relevant rules have no authority of law and "in this sense" Section 56 "stands *unclad* and must be constitutionally tested on its sweeping phraseology of naked brevity" (p. 552).

The second assault was on the inaccessibility of jail manuals to prisoners. The copy of the 1975 Manual handed to the Court cost Rs. 260.30! Justice Krishna Iyer was frank enough to give recognition to the allegation that the price of the Manual was raised from Rs. 20 to Rs. 260.30 "solely to deter people from coming to know the prison laws". He deplored the excessive pricing (in terms used by me in the first chapter of a companion book, from which this section is derived: *see* Baxi, 1980) as a violation of "democratic legality". He went further

to suggest that such devious methods constitute "legislative tyranny" and may be violative of fundamental rights of equal protection of laws and Article 19 freedoms. With characteristic pungency and pugnacity he observed:

> The cult of the occult is not the rule of law even as access to law is integral to our system. The pregnant import of what I have said will, I hope, be not lost on the executive instrumentality of the State (p. 561).

One hopes that the Supreme Court as an *institution* will, sooner rather than later, constrain the executive to respect its many-sided ruling in *Batra* and that the Bar and jurists will join the Court in the slow and painful march towards prison reform. The Supreme Court has ended the era of exile for prisoners from its well-nurtured constitutional paradise.

CONCLUSION

THE SEARCH FOR LEGITIMATION: POPULISM AND THE COURT

The Supreme Court of India, as a political group, has become increasingly people-oriented in its post-emergency phase. There are more references to the people in the constitutional decisions of the Court since the Sixth General Elections than ever before in the Court's history. "People" do not enter judicial discourse merely as a rhetorical or symbolic device. Rather, considerations of substantive justice to people are beginning to emerge as more decisive than those of technical, or lawyers', law. In this, the Court is frankly populistic: it assigns "supremacy" to the "will of people" over "any other standard, over the standards of traditional institutions and over the will of other strata". If populism "identifies the will of the people with justice and morality" (Shils, 1956: 104), the Court's post-emergency performance definitely amounts to populism. Indeed, the Court has begun to translate the expression "Union of India" as "People of India" and "State" as "People of the State". And this translation is further used to generate new and different approaches to legal interpretation and constitutional construction. For example, in *Karnataka* case, the Court using this device finds it impossible to hold that the interests of the people of India (Union) can be antithetical to those of the people of the State (Karnataka) in the matter of securing clean or pure public life. In the *Dissolution* case the rights of States, in their jural and constitutional sense, are not allowed to impede the rights of the people to go to polls, regardless of the strictly legal issues involved. People's faith in the judiciary is the *leitmotiv* of the special court report. And the subsidiary theme of protection of the people from political despotism and constitutional tyrannies is also frankly populistic in character. The lamented Justice Dwivedi's memorable words in *Kesavananda* are now coming true:

> The Constitution is not intended to be the arena of legal quibbling for men with long purses. It is made for the common people. It should generally be so construed that they can understand and appreciate it. The more they understand it, the more they love it and the more they prize it (p. 947).

The Constitution had become an "unlovable" document to the people for a while: the Court is now doing its very best to make the people learn to love and prize it.

Rights of the people have to be made real both by wide grants of power to the legislature, as well as by subordination of the legislature if it does not use this power or if it abuses it. *Reddy*, through its wide interpretation of "public purpose", annihilates the right to property by a judicial stroke of the pen so that the genuine needs of the common man be served with expedition. *Pathak* moves in the same direction when it seeks to embrace even choses-in-action in the State's eminent domain powers, with the common man caveats to such acquisition (*e. g.* annuity, provident fund etc). The "hungry job-seekers" are no longer at the mercy of the passport bureaucracy. And *Maneka*, in its unbridled expansiveness, in *Batra*, secures for the first time in Indian history the rights of prisoners, the hitherto forgotten men and women mercilessy condemned to the tyranny of the Indian legal system. Lawyers and "jurists" may well complain at the Court's penchant for substantive justice at the cost of formal legal rationality.

It is a characteristic of populism, in its broadest sense, that it denies to some extent the monopoly of legislative power to the elected representatives of the people and involves also the denial of a "degree of autonomy to the legislative branch of the Government, just as it denies autonomy to any institution" (Shils, 1965). In the constitutional scheme that is ours, there is of course no such thing as the monopoly of legislative power or of the executive power. But what is striking about the post-emergency Court is the degree to which it cuts down even the *pre-eminence* of legislative—and constituent power—by a direct attempt to redress people's miseries. Whether this is done through the redefinition of industry in *Bangalore Water Supply*, or the charter of legal aid in *Hoskot*, or through overall emasculation

of the right to property, or through a mini-takeover of the prison administration, the process is the same. The interests of the people require the Court to *lead* and the legislature to *follow*. Nothing much happens if the legislature does not follow since the Court has already made the law for the people, except that if the legislature does not act *at all* its subordination to the judiciary as an arm of the people becomes writ large on the body politic.

The Court is thus emerging as a populist, elite group. Such groups emerge in developing "Third World" countries where intellectuals feel "frustrated and humiliated" at the backwardness and injustice in society (de Tella, 1965; Stewart, 1969). The Court is such a group of middle-class intellectuals who can aim to achieve, through the exercise of the judicial power, a cure for the backward and static colonial character of the Indian legal system (Baxi, 1980). In a sense, such centres of a populistic nature are preceded by an experience of "disaster". Writers on populism have noted that such orientation, and even movement, is often generated among many groups in society, and particularly groups of "micro-entrepreneurs" and "respectable people on fixed pensions and other inflexible sources of income". Such people are normally "orthodox middle-class conservatives until disaster radicalizes them". The "disaster" in the case of the Court had been the emergency-ridden sectors of the law and the Constitution in 1975-77. The experience of such disaster, it is speculated, leads to a perception of "sudden downturn" in the affected people's "fortunes". This, in its wake, generates "extreme reactions" in terms of "ideology", which range from the "extremism of the centre" to the "middle-class right-wing radicalism" (Worsley, 1969: 241). It is difficult as yet to generalize about the peculiar nature of the Court's populist 'ideology'. But it is clear that there are traces of the middle-class right-wing radicalism in much of the Court's recent work.

In terms of my own value preferences, such a Court is a far more effective entity in national politics than a genuinely conservative Court. But how long the Court will retain its

militant activism and its populistic orientation is difficult to foresee. Equally difficult for me, at any rate, is the problem of correlation between the populistic orientation and politics since March 1977 and the same features on the Supreme Court. Is the populism of the Court related or relatable to the general current of populistic politics at the national level ushered in by the Sixth General Elections? Will it ebb with the ebb of the populistic strains in the national politics? or will it continue to influence the Court, serving as a genuine contribution to the national politics and governance? The answers to these questions depend not just on the wisdom and prescience of the analysts, including (unfortunately!) people like me, but also on the self-consciousness on the part of the wielders of the highest judicial power in the country. The Court has shown in recent years that when party-politics fails to realize for the people the values of justice, liberty, fraternity and dignity, they can look to the Court for "national fulfilment". But it can do this only when it is self-conscious about its power. The politics of the Court—be it the "purest politics" of constitutional adjudication or the hurly-burly politics of power-sharing at times, power-grabbing at others, represents the best hope for the millions of Indians for a new constitutional dawn. If the Court shuns it, it may do so at a very grave peril to its own legitimacy and survival in the future.

APPENDIX

Gist of the orders appealed against and

particulars of the petitions in

Union of India v. *Bhanudas Krishna Gawde*,

(1977) 1 SCC 834

FIRST BATCH OF APPEALS

Serial No.	No. of appeal	Date of the order appealed against	No. of the application in which the order appealed against has been passed	Name of the High Court which passed the order	Name of the detenu in whose favour or against whom the order appealed against has been passed	Substance of the Order appealed against
1	2	3	4	5	6	7
1.	Cri. A. 310 of 1976	September 1, 1975	Cri. Application 20 of 1975	Bombay	Krishna Budha Gawda	Clauses 9(*iii*), 10, 12(*ii*) and (*xi*), 19, 20, 21, 23, 24 and 31 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities (Maharashtra Conditions of Detention) Order, 1974 struck down and directions issued requiring the detaining authority to keep the detenu under detention as a 'civil prisoner' within the terms of and in all respects in conformity with the provisions of the Prisons Act, 1894 and further directing the detaining authority to permit the detenu to maintain himself by receiving such funds not exceeding the sum of Rs. 200 per month as he may desire to have for that purpose from any of his relatives or friends, and to purchase or receive from private sources at proper hours food, clothing, bedding, and other necessaries, including toilet requisites, toilet soap, cigarettes and tobacco, subject to examination and to such rules, if any, as may be approved by the Inspector General, as also to permit the detenu to meet persons with whom he may desire to communicate at proper times and under proper restrictions.
2.	Cri. A. 363 of 1976	—do—	—do—	—do—	—do—	—do—
3.	Cri. A. 397 of 1976	September 3, 1975	Cri. Application 792 of 1975	Bombay	Ghamandiram Kewalji Gowani	—do—

SECOND BATCH OF APPEALS

Serial No.	No. of appeal	Date of the order appealed against	No. of the application in which the order appealed against has been passed	Name of the High Court which passed the order	Name of the detenu in whose favour or against whom the order appealed against has been passed	Substance of the Order appealed against
1.	Cri. A. 348 of 1976	Interim order dated July 14, 1975	Cri. Application 794 of 1975	Bombay	Ramlal Narang	Directions issued to the detaining authority to permit the detenu (1) to have his food from outside at his own expense, subject to routine check, (2) to have one interview with his legal advisers for two hours in the presence of a customs officer, but not within his hearing, (3) to have one interview per month with any of the family members, which should be in accordance with and subject to sub-clauses (*iii*), (*vi*), (*vii*) and (*ix*) of Clause 12 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities (Maharashtra Conditions of Detention) Order, 1974.
2.	Cri. A. 350 of 1976	Interim order dated July 9, 1975	Cri. Application 784 of 1975	Bombay	Yusuf Abdulla Patel	Directions issued to the detaining authority (1) to permit the detenu to have his food from outside at his own expense subject to routine check, (2) to have the detenu examined at least once a week by doctors at St. George's Hospital and to permit the detenu's doctor being present at such examination, (3) to permit the detenu to take specially prescribed medicines at his own cost, (4) not to remove the detenu to another jail from the Arthur Road Prison, Bombay, without giving at least 24 hours' notice in writing

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THIRD BATCH OF APPEALS					
1.	Cri. As. 195-201 of 1976	April 3, 1976	Cri. Applications 833-839 of 1976	Bombay	Ratan Singh Gokaldas Rajda and others
2.	Cri. As. 170-176 of 1976	March 13, 1976	Cri. Applications 614-620 of 1976	Bombay	Smt. Ahilya Pandurang Ranganekar and others
3.	Cri. As. 181-182 of 1976	March 19, 1976	Cri. Applications 385-386 of 1976	Bombay	Ganesh Prabhakar Pradhan and others
4.	Cri. As. 1365-67 of 1976	March 23, 1976	W. Ps. 2293, 2477, 2503 of 1976	Karnataka	C. R. Satish and others
5.	C. A. 434 of 1976	April 1, 1976	I.A. IV W. P. 4177 of 1976	Karnataka	L. K. Advani
FOURTH BATCH OF APPEALS					
1.	Cri. A. 192 of 1976	March 23, 1976	W. P. 1454 of 1975	Karnataka	Gurunath Kulkarni
2.	Cri. A. 210 of 1976	April 6, 1976	W. P. 2096 of 1976	Karnataka	K. T. Shivanna

7

(excluding Sundays and other holidays) to his attorneys, (5) to permit the detenu to have one interview with his legal advisers for two hours in the presence of a customs officer, but not within his hearing, and (6) to permit the detenu to have interview with relatives as per Clause 12(*ii*) of Maharashtra Conditions of Detention Order, 1974.

Directions issued to the detaining authority to have the detenus taken under custody to the site of the meeting of the Bombay Municipal Corporation and enable them to exercise their votes at the mayoral election, if and when it takes place.

While rejecting the application for release on parole directions issued to the detaining authority to have the detenus taken under custody to vote at the election of statutory committees to be held on March 15, 1976 at 3 p.m. at the Bombay Municipal Corporation, Bombay.

Directions issued to the detaining authority to have the detenus taken under custody to the Maharashtra Legislative Council Hall for the limited purpose of enabling them to exercise their right to vote at the elections to the statutory committees on March 30, 1976.

Directions issued to the detaining authority to have the detenus taken not later than 11 a.m. on March 24, 1976 under police escort to the place where the election of the President of the Town Municipal Council, Chikmagalur was to be held and after they exercised their right to vote, to have them brought back under police escort to the jails in which they were then detained.

Directions issued to the detaining authority to have the detenu taken under police escort to New Delhi so as to enable him to be in Rajya Sabha on April 3, 1976 before 10.45 a.m. and to allow him to take oath of affirmation and thereafter to take his seat in the Rajya Sabha and to have him brought back under police escort to the Central Jail, Bangalore on April 3, 1976 or on April 4, 1976 whichever date is convenient to the detaining authority.

Directions issued to the detaining authority (1) to have the detenu taken under police escort on or before April 3, 1976 to the shops in Bellary to enable him to purchase stationery required for the examination and to the college where the detenu had to get the admission ticket to the examination, (2) to have the detenu taken on each day of the examination under police escort from the jail at Bellary to the examination centre and to see that he reached such centre at least 20 minutes before the commencement of the examination and was brought back after the day's examination was over, from such centre to the jail under police escort. Directions also issued to the jail authorities to ascertain well in advance the programme of the examination which the detenu had to take.

Directions issued to the detaining authority to release the detenu on parole on the afternoon of April 10, 1976. The detaining authority also directed to arrange to have the detenu either taken under police escort to his home at Honavinakere, Tiptur Talu, starting from Bangalore on the afternoon of

1	2	3	4	5	6	7
						April 10, 1976 and to have him brought back under police escort from his home to the Central Jail, Bangalore, starting from Honavinakere on the afternoon of April 12, 1976 OR release the detenu at the gate of the Central Jail, Bangalore on his executing a self-bond for Rs. 6,000 undertaking to surrender himself to the jail authorities on April 12, 1976 not later than 6 p.m. and not to take part in political activities or other activities detrimental to the security of the State during the period he remained on parole. The police, however, given the liberty to keep a watch around the detenu's house and to follow his movements outside his house during the period he continued on parole.
3.	S. L. P. (Civil) 2443 of 1976	April 8, 1976	W. P. 2918 of 1972	Karnataka	K. A. Nagaraj	Directions issued to the detaining authority (1) to release the detenu on parole, (2) to have the detenu taken on the evening of April 9, 1976 under police escort to his house and brought back to the Central Jail, Bangalore, under police escort on the evening of April 10, 1976, and (3) again have the detenu taken on the evening of April 14, 1976 under police escort to his house and brought back under police escort to the Central Jail, Bangalore, on the evening of April 15, 1976. The police, however, given the liberty to keep a watch around the house of the detenu and to follow his movements during the period he remained on parole.
4.	S. L. P. (Civil) 2444 of 1976	April 8, 1976	W. P. 6693 of 1975	Karnataka	P. B. Satyanarayana Rao	Directions issued to the detaining authority to release the detenu on parole on April 14, 1976 and to have him taken under police escort to his house and brought back under police escort to the jail on the afternoon of April 16, 1976. The police, however, given the liberty to keep a watch around the house of the detenu and to watch his movements outside his house during his release on parole.
5.	S. L. P. (Civil)	April 7, 1976	W. P. 1977 of 1976	Karnataka	M. Sanjeeva Gatti	Directions issued to the detaining authority either (*i*) to arrange the detenu taken under police escort to his native place, Bangalore, starting from Bangalore on April 8, 1976 and brought back under police escort to the Central Jail, Bangalore on April 14, 1976 or (*ii*) to release the detenu at the gate of the Central Jail, Bangalore, on the morning of April 8, 1976 on his executing a self-bond of Rs. 5,000 undertaking to surrender himself to the jail authorities not later than 5 p.m. on April 15, 1976 and not to take part in any political activity or other activity detrimental to the security of the State. The police, however, given the liberty to keep a watch around the house or houses in which the detenu stayed and to follow his movements outside the house or houses during the period he remained on parole.
6.	S. L. P. (Civil) 2865 of 1976	April 8, 1976	W. P. 2012 of 1976	Karnataka	V. S. Acharya	Directions issued to the detaining authority either to arrange to have the detenu taken under police escort from Central Jail, Bangalore to Udipi starting from Bangalore on the morning of April 13, 1976 and to have him brought back under police escort from Udipi starting therefrom on the morning of April 21, 1976 or release the detenu at the gate of the Central Jail, Bangalore, on his executing a self-bond for Rs. 5,000 undertaking not to take part in any political activity or in any activity detrimental to the security of the State during the period he remained on parole and to surrender himself to the jail authorities not later than 6 p.m. on April 21, 1976. The police, however, given the liberty to keep a watch over the detenu and to follow his movements during the period he remained on parole.

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7.	S. L. P. (Civil) 3061 of 1976	April 8, 1976	W. P. 1295 of 1976	Karnataka	C. V. Shankar Rao Jadhav	Directions issued to the detaining authority either (1) to arrange to have the detenu taken to his home at Mandya under police escort starting from Bangalore on the evening of April 10, 1976 and to have him brought back under police escort to the Central Jail, Bangalore starting from Mandya on the morning of April 13, 1976, or (2) to release him at the gate of the Central Jail, Bangalore on the evening of April 10, 1976 on his executing a self-bond for Rs. 5,000 undertaking to surrender himself to the jail authorities not later than 4 p.m. on April 12, 1976 and not to take part in any political activity or other activity detrimental to the security of the State during the period of his release on parole. The police, however, given the liberty to keep a watch around the detenu's house and to follow his movements outside his house during the period of his release on parole.
						FIFTH BATCH OF APPEALS
1.	Dy. 3002 of 1976	April 8, 1976	W. P. 2355 of 1976	Karnataka	D. J. Shivaram	Prayer of the detenu to allow him to be released on parole to enable him to take the final LL.B. examination rejected in view of the orders made by this Court, i.e. the Supreme Court, in High Court W.P. 1454 of 1976.
2.	Dy. 3003 of 1976	April 8, 1976	W. P. 1968 of 1976	Karnataka	Hanumant Gururao Inamdar	Prayer of the detenu to allow him to be released on parole to enable him to take the second year LL.B. examination rejected in view of the orders made by this Court in High Court W. P. 1454 of 1976.
						SIXTH BATCH OF APPEALS
1.	C. A. 349 of 1976	July 18, 1975	Cri. Application 794 of 1975	Bombay	Ramlal Narang	Directions issued to the detaining authority not to remove the detenu till further order to another jail outside the State without giving at least 24 hours' notice in writing (excluding Sunday and other holidays) to the detenu's attorneys.
2.	C. A. 573 of 1976	March 20, 1976	Cri. Application 31 of 1976	Bombay	Prabhudas Tribhovandas	Directions issued to the detaining authority to detain the detenu in such prison where the detenu would have the benefit of the company of other women detenus as also other facilities under the rules.

REFERENCES

Baxi, Upendra — THE CRISIS OF THE INDIAN LEGAL SYSTEM (1980 : Allied, forthcoming)

Baxi, Upendra — Introduction to K. K. Mathew on DEMOCRACY, EQUALITY AND FREEDOM (1978 : Eastern Book Co.)

Baxi, Upendra — " 'The Little Done, The Vast Undone'. . . ." (1969) 9 *J.I.L.I.* 323*

Baxi, Upendra — "The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment" (1974) 1 *Supreme Court Cases* (*Jour*) 45

Basu, Durga Das — LIMITED GOVERNMENT AND JUDICIAL REVIEW (1972 : S. C. Sarkar & Co.)

Bhusan, Prasant — THE CASE THAT SHOOK INDIA (1978 : Vikas)

Bickel, Alexander M. — THE LEAST DANGEROUS BRANCH : THE SUPREME COURT AT THE BAR OF POLITICS (1962 : Bobs Merill)

Blackshield, A. R. — " 'Fundamental Rights' and the Institutional Viability of the Indian Supreme Court" (1966) 8 *J.I.L.I.* 138

Crick, Bernard — IN DEFENCE OF POLITICS (1962 : Weidenfeld & Nicholson)

Datta Gupta, Sobhanlal — "The Supreme Court and the Indian Capitalism (1950-1967)" in Mukhopadhyay (ed.) SOCIETY AND POLITICS IN CONTEMPORARY INDIA (1974 : Council for Political Studies) pp. 167-87

Dhavan, Rajeev — THE SUPREME COURT OF INDIA : A SOCIO-LEGAL CRITIQUE OF ITS JURISTIC TECHNIQUES (1977: N. M. Tripathi)

Dhavan, Rajeev — "Amending the Amendment : The Constitution Forty-Fifth Amendment Bill" (1978) 20 *J.I.L.I.* 249

Dhavan, Rajeev & Jacob, Alice — SELECTION AND APPOINTMENT OF SUPREME COURT JUDGES (1978 : Ind. Law Inst., Tripathi)

Dhavan, Rajeev & Jacob, Alice — "The Dissolution Case : The Supreme Court at the Bar of Politics" (1977) 19 *J.I.L.I.* 355

---

* JILI refers to the *Journal of the Indian Law Institute*

Dhavan, Rajeev & Singh, Balbir	Publish and be Damned—The Contempt Power and the Press at the Bar of the Supreme Court, (1979) 21 *J.I.L.I.* 1
di Tella, T. S.	"Populism and Reform in Latin America" in C. Veliz (ed.) OBSTACLES TO CHANGE IN LATIN AMERICA (1965 : Oxford).
Griffith, J. A. G.	THE POLITICS OF THE JUDICIARY (1977 : Fontana)
Lewellyn, Karl	THE COMMON LAW TRADITION : DECIDING APPEALS (1961).
Mahajan, Mehr Chand	LOOKING BACK (1961 : Asia)
Miller, A. S. & Howell, R. F.	"The Myth of Neutrality in Constitutional Adjudication" (1960) 27 *Uni. of Chicago L. Rev.* 661
Rostow, Eugene V.	THE SOVEREIGN PREROGATIVE : THE SUPREME COURT AND THE QUEST FOR LAW (1962 : Yale)
Sathe, S. N.	"Limitations on Constitutional Amendment : 'Basic Structure' Principle Re-examined" in INDIAN CONSTITUTION : TRENDS AND DEVELOPMENTS (1978 : Ind. L. Inst., Tripathi) 192
Setalvad, M. C.	MY LIFE : LAW AND OTHER THINGS (1971 : Tripathi)
Seervai, H. M	THE EMERGENCY, FUTURE SAFEGUARDS AND THE HABEAS CORPUS CASE (1978 : Tripathi)
Shils, Edward	THE TORMENT OF SECRECY : THE BACKGROUND AND CONSEQUENCES OF AMERICAN SECURITY POLITICS (1965 : Heinmann) 98-104
Shourie, Arun	THE SYMPTOMS OF Fascism (1978 : Vikas)
Singh, M. P.	"Legislative Power : Some Clarifications" (1974-75) 4-5 *Delhi L. R.* 73
Stewart, Agnus	"The Social Roots" in G. Ionescue & E. Gellner (ed.) POPULISM : ITS MEANINGS AND CHARACTERISTICS (1969 : Weidenfed & Nicholson) p. 150
Stone, Julius	LEGAL SYSTEMS AND LAWYERS' REASONINGS (1964 : Maitland)
Stone, Julius	SOCIAL DIMENSIONS OF LAW AND JUSTICE (1966 : Maitland)
Tripathi, P. K.	"Rule of Law, Democracy and the Frontiers of Judicial Activism", (1975) 17 *J.I.L.I.* 17
Worsley, Peter	"The Concept of Populism" in Populism, *op. cit.*, p. 212

CASE ABBREVIATIONS

Bangalore Water Supply	*Bangalore Water Supply & Sewerage Board* v. *Rajappa*, (1978) 2 SCC 213
Bank Nationalization	*R. C. Cooper* v. *Union of India*, (1970) 1 SCC 248
Bhanudas	*Union of India* v. *Bhanudas*, (1977) 1 SCC 834
Dissolution Case	*State of Rajasthan* v. *Union of India*, (1977) 3 SCC 592
Golak Nath	*Golak Nath* v. *State of Punjab*, AIR 1967 SC 1643
Gopalan	*A. K. Gopalan* v. *State of Madras*, AIR 1950 SC 27
Habeas Corpus Case	See *Shiv Kant*, *infra*
Hoskot	*M. H. Hoskot* v. *State of Maharashtra*, (1978) 3 SCC 544
Indira Nehru Gandhi	*Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1
Karnataka Case	*State of Karnataka* v. *Union of India*, (1977) 4 SCC 608
Kesavananda	*Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225
L. I. C. Case	See *Pathak*, *infra*
Latafat	*Latafat Ali Khan* v. *State of U. P.*, (1971) 2 SCC 355
Makhan Singh	*Makhan Singh* v. *State of Punjab*, AIR 1952 SC 27
Maneka	*Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248
Moti Ram	*Moti Ram* v. *State of M. P.*, (1978) 4 SCC 47
Mulgaonkar	*In Re Mulgaonkar*, (1978) 3 SCC 339
Pathak	*Madan Mohan Pathak* v. *Union of India*, (1978) 2 SCC 50
Prag	*Prag Ice & Oil Mills* v. *Union of India*, (1978) 3 SCC 459
Reddy	*State of Karnataka* v. *Ranganatha Reddy*, (1977) 4 SCC 471
Romesh Thapar	*Romesh Thapar* v. *State of Madras*, AIR 1950 SC 124
Sham Lal	*In Re Sham Lal*, (1978) 2 SCC 479

Shiv Kant	*A. D. M., Jabalpur* v. *Shiv Kant Shukla,* (1976) 2 SCC 521
Special Courts Reference	*In Re Special Courts Bill, 1978,* (1979) 1 SCC 380
Transfer	*Union of India* v. *Sankalchand Himatlal Sheth,* (1977) 4 SCC 193

TABLE OF CASES

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INDEX

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